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## Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice

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# OF SHRINES, MEMORIALS AND MUSEUMS: USING THE INTERNATIONAL CRIMINAL COURT'S VICTIM REPARATION AND ASSISTANCE REGIME TO PROMOTE TRANSITIONAL JUSTICE

Frédéric Mégret\*

*This article reviews and critically assesses the Rome Statute's complex victim reparation and assistance regime. The regime is a dual one, characterized by its reliance both on reparations ordered by the International Criminal Court and assistance provided by the Trust Fund for Victims. Both approaches raise a series of quantitative, qualitative, scope and contextual problems which are very imperfectly answered at present. In particular, there is a risk that the broader needs of transitional justice will be omitted as falling neither under "reparations" or "assistance." Rather than address the issue of the best reparations/assistance regime in the abstract, this article explores the real-world potential of a particular form of transitional practice, namely the construction of shrines, memorials and museums to commemorate victims of mass crimes. I conclude that there are complex ties between the construction of such "monuments" and memory, transitional justice, and victim expectations. Moreover, there is a discreet but constant practice of fitting the building of such commemorative monuments both within judicial theories, such as responsibility and reparation, and less formal processes of reckoning with the past, such as truth commissions. The experience of the Inter-American Court of Human Rights in ordering monuments as reparations is highlighted as evidence of an innovative international best practice. This article seeks to assess how this experience could be transferred to the ICC/TFV context. I conclude that, although additional complexities would arise, there is no reason why the Rome Statute's victim reparation and assistance regime could not order or encourage the building of so-called "sites of conscience." Such action would better manage victim expectations, make good use of scarce resources, address collective victim needs, make sense symbolically of the*

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*harm caused, provide a more complex narrative of events than international criminal verdicts, highlight multiple causes and responsibilities, and help distinguish the ICC and TFV's efforts from competing initiatives. It would, in other words, help better integrate international criminal justice with transitional justice goals.*

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## INTRODUCTION

Ever since the creation of the International Criminal Court (ICC), one of its great ambitions has been to provide a meaningful avenue of redress for victims. Now approaching the end of its first decade of existence, the ICC's reparations regime remains a bit of a mystery,<sup>1</sup> which is not entirely a surprise given the absence and, at this stage, seeming remoteness of any verdict. The Rome Statute and Rules of Procedure for the ICC are stronger guides for the procedural regime for reparations<sup>2</sup> than they are for the actual substance of the reparations. The Trust Fund for Victims (TFV), a separate institution created by the Rome Statute that is to complement the Court's actions vis-à-vis victims, has been careful not to make too many declarations as to what its policy might be, and is only beginning to be active. To an extent, the ICC's policy vis-à-vis victims has yet to be defined, and has the potential to be a dense field of developments and challenges in years ahead.

There is no doubt that the stakes are considerable. The magnitude of suffering provoked by mass atrocities has grave implications for international peace and security, as well as transition from tragic events to a process of healing. Indeed, it is on a scale that has rarely been witnessed before. Taking such suffering into account will condition the ability of soci-

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<sup>1</sup> Significant literature on the topic remains scant. See generally Carla Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15 LEIDEN J. INT'L L. 667 (2002); Peter G. Fischer, *The Victims' Trust Fund of the International Criminal Court - Formation of a Functional Reparations Scheme*, 17 EMORY INT'L L. REV. 187 (2003); DINAH L. SHELTON & THORDIS INGADOTTER, CTR. ON INT'L COOPERATION, N.Y. UNIV., *THE INTERNATIONAL CRIMINAL COURT REPARATIONS TO VICTIMS OF CRIMES (ARTICLE 75 OF THE ROME STATUTE) AND THE TRUST FUND (ARTICLE 79): RECOMMENDATIONS FOR THE COURT RULES OF PROCEDURE AND EVIDENCE* (1999), available at [http://www.pict-pecti.org/publications/PICT\\_articles/REPARATIONS.pdf](http://www.pict-pecti.org/publications/PICT_articles/REPARATIONS.pdf); Jo-anne Wemmers, INT'L CTR. FOR COMPARATIVE CRIMINOLOGY, UNIV. OF MONTREAL, *REPARATION AND THE INTERNATIONAL CRIMINAL COURT: MEETING THE NEEDS OF VICTIMS* (2006) [hereinafter WEMMERS REPORT], available at [http://www.cicc.umontreal.ca/recherche/victimologie/reparation\\_icc.pdf](http://www.cicc.umontreal.ca/recherche/victimologie/reparation_icc.pdf); .

<sup>2</sup> See Assembly of States Parties to the Rome Statute of the International Criminal Court, New York, Sept. 3-10, 2002, *Rules of Procedure and Evidence*, Rules 94, 95, 106, ICC-ASP/1/3, available at [http://www.amicc.org/docs/Rules\\_of\\_Proc\\_and\\_Evid\\_070704-EN.pdf](http://www.amicc.org/docs/Rules_of_Proc_and_Evid_070704-EN.pdf) [hereinafter ICC Rules]; Int'l Criminal Court [ICC], *Regulations of the Court*, ICC-BD/01-01-04 (May 26, 2004), available at <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/> (follow "The Regulations of the Court" hyperlink; then follow "English" hyperlink) [hereinafter ICC Regulations].

eties to pull through particularly traumatic episodes with a sense of justice. Moreover, to the extent that victims increasingly invest hopes in the Court's reparations regime, the Court's success will be tied to its ability to deliver on this front. Further complicating the debate, the growing role of international human rights law ensures that this issue is no longer simply one of policy, but one increasingly tainted with obligation. For better or for worse, the hopes of victims are now by necessity turned towards the reparations regime governed by the ICC and TFV, at the expense of a number of alternative mechanisms.

However, there already seems to be a danger of gaps between what the Court and the Fund promise implicitly and what they can deliver. There further remain some significant conceptual ambiguities about each of their roles, and their role vis-à-vis each other. In this article, I will refer to the "Rome regime" or "Rome institutions" as an acknowledgment of the fact that it is sometimes useful to treat these as part of a broad scheme. However, the reality is that the system is also a profoundly dual, hybrid, even schizophrenic one. The main tension running through the whole "Rome regime" is one between Court-ordered reparations, on the one hand, and TFV-managed assistance on the other. Reparations are perhaps what the ICC was originally and primarily supposed to provide to victims. In the ICC context, they are linked to the trial process and a finding of guilt, and are ordered against the convicted person to compensate his or her victims on the basis of responsibility for harm caused. They are typically backward looking, and classically seek to put the victimized individual or group in the position they were before the crime occurred. The logic of TFV assistance is quite different. It is not judicial and follows a pattern more akin to that of certain domestic victim compensation schemes, which lies somewhere between humanitarian and welfare logics. For example, most of the assistance the Fund can provide is not tied to any particular finding of guilt, and is funded by voluntary contributions by third parties.

This creates a complex conundrum in terms of what the Rome institutions are supposed to do vis-à-vis victims. If, on the one hand, one conceives of the ICC as the primary institution for victims to seek recourse, and as primarily an institution of *international criminal justice* (i.e., one that tries people first and foremost, whatever else may ensue), then what is done for victims will depend closely on what happens in the courtroom, and reparations will be the key concern for victims. If, on the other hand, one considers that the TFV will have the leading role when it comes to victims, then rehabilitation and assistance are what victims can primarily expect from the Rome institutions. The TFV has the potential to shift the emphasis away from reparations altogether, especially since it will start working with victims much earlier than the Court and will be much more accessible. Nev-

ertheless, there is much tension between the two Rome institutions, and it is already clear that the ICC's approach to victim efforts, which is oriented more towards legal and human rights, will be in conflict with the TFV's more humanitarian ambitions.

This article will not be predominantly concerned with this tension between the ICC reparations logic and the TFV's assistance focus as such, although it will be interested in some of the obstacles and potentialities that such tension creates. Rather, I suggest that *both* institutions will miss their true potential if they fail to take into account the particular needs of *transitional justice*.<sup>3</sup> Although international criminal justice and transitional justice are sometimes equated, and are arguably complementary, they are, of course, quite different paradigms of what is the most important strategy to pursue in the aftermath of atrocities. International criminal justice is the effort to prosecute individuals internationally for the commission of crimes under international law. It has given rise to such concepts and institutions as universal jurisdiction and international criminal tribunals. In this article, transitional justice is conceived, minimally, as the particular form of justice required by a society's move from a state where international crimes are committed to one where they are no longer. Its emphasis is on the need to reestablish a culture of legal normality after episodes in which graves crimes have been committed.

Tensions between international criminal justice and transitional justice have been demonstrated, for over a decade now, as being potentially very problematic, particularly for the fate of international criminal tribunals.<sup>4</sup> In the context of the ICC/TFV regime, there is nothing evident about adopting a more "transitional" role. Transitional justice has increasingly focused on the needs of victims, whose participation in healing processes and reintegration into society is generally considered crucial if societies are to transcend traumatic episodes. At the same time, transitional justice offers a slightly different take on victim needs than either the ICC's legal emphasis on reparations or the TFV's welfarist focus on assistance.

This is evidenced, for example, by the quite strong reaction of some NGOs to the TFV's first draft "Strategic Plan"<sup>5</sup> which significantly referenced the idea of "transitional justice,"<sup>6</sup> and noted that "promoting commu-

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<sup>3</sup> See generally RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000) (discussing what is meant by "transitional justice").

<sup>4</sup> See, e.g., José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999).

<sup>5</sup> Trust Fund for Victims [TFV], *TFV Global Strategic Plan 2008-2011, version 1*, (2008) (on file with the author) [hereinafter *Global Strategic Plan*].

<sup>6</sup> *Id.* at 21, 23, 81.

nity reconciliation”<sup>7</sup> was within its mandate. The NGOs argued that reconciliation, a hallmark of transitional justice, is “beyond the Fund’s mandate”<sup>8</sup> and that “[i]nstead, the Fund’s activities should aim at providing redress for victims, restoring victims’ dignity and facilitating their reintegration into society.”<sup>9</sup> Whether these goals are incompatible is, of course, open to question. Transitional justice is typically very attentive to how victims’ needs are inseparable from an aspiration to justice, as well as how such needs are ultimately dependent on the manner in which the suffering of the victims is taken into account as part of larger processes of reckoning. However, my point here is that there already seems to be a tension between the Court’s reparatory focus, the TFV’s assistance orientation, and the larger needs of societies in transition. Nevertheless, somewhere on the fault lines of the ICC and the TFV regimes, this tension may precisely open a space for efforts more resolutely geared towards transitional justice by the “Rome institutions.”

As a prime example of what the ICC and the TFV could do, I suggest a slightly unorthodox mix of international criminal and transitional justice, reparations and assistance, the material and the symbolic. I am particularly interested in a real-world practice that has had a known and significant impact on victims and transitional justice processes, and that I consider emblematic, rather than exclusive, of what the Rome institutions could encourage, namely, the building of what are often referred to as “sites of conscience.”<sup>10</sup> Sites of conscience are, essentially, sites built with a specific commemorative purpose that aim to encourage reconciliation and the non-repetition of certain types of historical events. They can include monuments such as shrines, memorials and museums. They have, I argue, a key role to play in bridging legal concepts of victim reparation, humanitarian ideas of victim assistance and the larger needs of transitional societies.

On the face of it, such a role for the Rome institutions can seem quite remote from what the ICC reparations/assistance regime should be geared towards. Indeed, the possibility is rarely mentioned, except in pass-

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<sup>7</sup> *Id.* at 11, 23, 24, 58, 59, 80, 81.

<sup>8</sup> Coalition for the Int’l Criminal Court, *Comments on the Trust Fund for Victims’ Global Strategic Plan for 2009-2011*, 2, (March 2009) [hereinafter *Comments on Global Strategic Plan*], available at [http://www.coalitionfortheicc.org/documents/CICC\\_TFV\\_Team\\_Comments\\_on\\_TFV\\_Strategic\\_Plan\\_2009-2011\\_March\\_2009.pdf](http://www.coalitionfortheicc.org/documents/CICC_TFV_Team_Comments_on_TFV_Strategic_Plan_2009-2011_March_2009.pdf).

<sup>9</sup> *Id.* at 3.

<sup>10</sup> See International Coalition of Sites of Conscience, <http://www.sitesofconscience.org/about-us/en/#section2> (last visited Apr. 12, 2010).

ing, in the literature on international criminal justice.<sup>11</sup> Nevertheless, the TFV itself has hinted at the possibility of “projects like memorials,” whose goal is to “acknowledge . . . atrocities.”<sup>12</sup> Shrines, monuments and museums, I argue, are powerful elements of transitional justice, and provide the sort of endeavor to which the ICC/TFV regime could contribute usefully. Part I of this article briefly retraces the origins of the ICC reparations and TFV assistance regime. Part II suggests some of the limitations of the regime. Part III introduces the history and role of “sites of conscience” as tools of transitional justice. In part IV, a number of cases are examined where domestic or international bodies have already ordered the construction of such edifices as forms of reparation or rehabilitation. In part V, I make the case that ordering or assisting in the construction of such “sites of conscience” would be a powerful way of making sense of the ICC’s reparative function.

## I. THE ROME STATUTE’S VICTIMS REGIME: A BRIEF OVERVIEW

For the purposes of a succinct presentation, the Rome Statute’s victim-oriented efforts can be divided into three broad types of activities, although they overlap to a degree.

### A. *Protection and Participation*

The ad hoc tribunals already protected victims to the extent that they appeared as witnesses.<sup>13</sup> The ICC regime will obviously continue to do this, by protecting victims who testify in a way that minimizes any adverse impact to them.<sup>14</sup> All organs of the Court are vested with the obligation to provide appropriate measures to fully protect victims appearing during proceedings. A Victims and Witness Unit has been established to ensure the safety of those participating and to protect the right of victims to express

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<sup>11</sup> The only person to my knowledge to have suggested such a new function for the Rome institutions is Linda Keller. See Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims’ Reparations*, 29 T. JEFFERSON L. REV. 189, 210-12 (2006).

<sup>12</sup> *Global Strategic Plan*, *supra* note 5, at 11.

<sup>13</sup> See ICTY, Witnesses, <http://www.icty.org/sid/158> (last visited Apr. 12, 2010); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 22, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

<sup>14</sup> See ICC Rules, *supra* note 2, Rules 87, 88.



their concerns freely.<sup>15</sup> Victim protection measures include security arrangements, counseling and other forms of assistance deemed appropriate.<sup>16</sup>

However, protection, even though it may entail the provision of psychological counseling or medical rehabilitation, is not to be confused with assistance provided to victims more generally. In a sense, victims who testify are being “groomed” by international criminal tribunals for the purposes of testifying. One can see whatever assistance provided by the tribunals as partly instrumental (as shown, for example, by the fact that most assistance occurs immediately before and immediately after the testimony, rather than over the long term). Protection is necessary not so much because victims need it as because international criminal tribunals need witnesses. Because the witnesses’ participation will depend on their perception of how they will be treated and, in particular, how they will be protected, it is crucial for tribunals to be able to provide some guarantees.

The Rome Statute, however, goes much further in the direction of victim protection by proclaiming, for the first time in the history of international criminal justice, a principle of victim participation “[w]here the personal interests of the victims are affected . . . .”<sup>17</sup> At every stage, victims are considered as participants, although not quite parties, whenever their interests are involved.<sup>18</sup> Victims are provided support by the Court.<sup>19</sup> Victims have already successfully obtained the right to participate, including at the investigation stage.<sup>20</sup> The Court also allows representation of organizations and institutions.<sup>21</sup> There is even an emerging sense that participation by victims translates into at least a rough accountability of the Court to the victims. For example, the Victims’ Participation and Reparation Section is

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<sup>15</sup> See *id.* Rule 87(1).

<sup>16</sup> See ICC, Victims and witness protection and support, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Protection/> (last visited Apr. 12, 2010) [hereinafter Victim and Witness Protection].

<sup>17</sup> Rome Statute of the International Criminal Court, art. 68(3), A/CONF.183/9 (July 1, 2002), available at [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf) [hereinafter Rome Statute].

<sup>18</sup> See *id.* art. 15(3), 19(3), 53(1)(c), 53(2)(c), 65(4) and 68(3).

<sup>19</sup> See *id.* art. 68.

<sup>20</sup> *First victims recognized by the International Criminal Court*, INT’L FED’N FOR HUMAN RIGHTS [FIDH], Jan. 20, 2006, available at [http://www.fidh.org/article.php?id\\_article=2998](http://www.fidh.org/article.php?id_article=2998).

<sup>21</sup> ICC, Office of Public Counsel For Victims, Frequently Asked Questions, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Office+of+Public+Counsel+Victims/Frequently+Asked+Questions.htm> (last visited Apr. 12, 2010).

obliged to provide information where the Office of the Prosecutor has decided not to open an investigation or commence with a prosecution.<sup>22</sup>

### B. *Reparation*

More important, perhaps, than just participation is, as was mentioned in the introduction, the emergence of a reparation regime for victims of certain crimes where a person prosecuted by the Court has been found guilty.<sup>23</sup> This is surely one of the most significant developments of the Rome Statute. The sole means of reparation provided for by the ad hoc tribunals' statutes involved restitution of stolen property,<sup>24</sup> something which the tribunals have never actually ordered. The individual victim of someone convicted by the International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Tribunal for the Former Yugoslavia (ICTY) was otherwise to claim reparations through the national courts, once the accused had been convicted and the judgment had been transmitted to the national authorities.<sup>25</sup> This method of potential redress has had next to no impact in practice.

The idea that victims of grave human rights violations are entitled to reparations is one that has emerged strongly in the last two decades,<sup>26</sup> following a number of landmark reports on the issue.<sup>27</sup> In 2005, it was sol-

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<sup>22</sup> ICC, Participation of Victims in Proceedings, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Participation/> (last visited Apr. 12, 2010).

<sup>23</sup> See Rome Statute, *supra* note 187, art. 75; ICC Rules, *supra* note 2, Rules 94-99.

<sup>24</sup> S.C. Res. 955, art. 23(3), U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

<sup>25</sup> See *id.*; Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Extraordinary Plen. Sess., at 104, IT/32/Rev. 42 (Nov. 4, 2008).

<sup>26</sup> See generally, ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW (2004).

<sup>27</sup> See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Final Report: The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Doc. E/CN.4/2000/62 (Jan. 18, 2000) (prepared by Mr. M. Cherif Bassiouni) [hereinafter *Bassiouni Report*]; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination and Prot. Of Minorities, *Revised Final Report: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997) (prepared by Mr. Joinet) [hereinafter *Joinet Report*]; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination and Prot. Of Minorities, *Final Report: Study Concerning*

emnly proclaimed by the General Assembly in what is known as the "Victims Declaration."<sup>28</sup> The Victims Declaration has been dubbed, "for all practical purposes, an international bill of rights of victims."<sup>29</sup> Already in 1998, when the Rome Statute was adopted, a strong consensus had emerged that the ICC could not fail to provide some form of reparation. As can be seen, the idea of reparation for grave crimes has both a strong legal and a strong human rights bias; reparation is a right, as confirmed by a long string of cases.<sup>30</sup>

Reparations awarded by the ICC will be funded in large part through fines, forfeitures and reparations ordered by the Court against convicted individuals.<sup>31</sup> Contrary to the regime of the ad hoc tribunals, therefore, it is contemplated that reparations will not be outsourced to domestic courts, but will be very much centralized within the hands of the Court itself, which can order them against individual defendants following a guilty verdict.<sup>32</sup> This regime is more complex and notable than that of the tribunals because the Court, in its reparation-awarding function, can be supplemented by the TFV.<sup>33</sup> In that particular (and probably secondary) role, the TFV will act as the implementer of some of the reparations awards ordered by the Court.<sup>34</sup> This is presumably because it will be impractical for the Court to take care of every detail of every reparations award, and the TFV may be more suited in some cases to making collective awards. The TFV will be required to take a variety of factors into account when "determining the nature and/or size of awards," such as "the nature of the crimes

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*the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Doc E/CN.4/Sub.2/1993/8 (July 2, 1993) (prepared by Mr. Theo van Boven) [hereinafter *van Boven Report*].

<sup>28</sup> See Victims Declaration, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter *Victims Declaration*].

<sup>29</sup> M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203, 203 (2006). See generally Angel David Nieves & Ali Khangela Hlongwane, *Public History and "Memorial Architecture" in the "New" South Africa: The Hector Pieterse Memorial and Museum, Soweto, Johannesburg* 8 Safundi 351 (2007) (discussing a particular impact of the Victims Declaration).

<sup>30</sup> See *infra* § 4.

<sup>31</sup> See Regulations of the Trust Fund for Victims, ICC Res. ICC-ASP/4/Res.3, para. 21, ICC, 4th plen. mtg., ICC-ASP/4/Res.3 (Dec. 3 2005) [hereinafter *TFV Regulations*].

<sup>32</sup> Rome Statute, *supra* note 187, art. 75(2).

<sup>33</sup> See *id.*

<sup>34</sup> See ICC Rules, *supra* note 2, Rule 98.

[and] the particular injuries to the victims . . . .”<sup>35</sup> The Board of Directors of the TFV is to devise an “implementation plan” which will be supervised by the relevant Chamber, even though it clearly leaves a measure of autonomy for the Board.<sup>36</sup>

Notwithstanding the TFV’s eventual *bons offices*, there is a sense that the primary strength of the ICC reparation regime, which is its rootedness in a strong concept of legal entitlement, might also be its main weakness. The emphasis on reparation is very much the result of a strong legal and human rights framework. However, the “right to reparations” is an idea that was meant to apply primarily to states and give rise to reparations programs managed by states. Although international criminal tribunals arguably deal with the equivalent of mass human rights violations, their focus is clearly different than state reparations programs in that the international tribunals are primarily designed to condemn individuals. In fact, the “responsible state” is the great absent in proceedings before the Court, except for purposes of admissibility and cooperation. This absence is clearly not compensated by the individual accused, who, if nothing else, will often simply not have anything like the deep pockets of the state.

### C. Assistance

The Rome Statute, perhaps anticipating these limitations, also provides, through the TFV, a possibility of “assistance” to victims. In the past, the ICTR registry has controversially engaged in some rehabilitation programs in Rwanda, including the financing of a survivors’ village.<sup>37</sup> This resembles what the TFV now proposes to do, except that the ICTR acted precariously outside of any legal framework, whereas the TFV will rest on firm foundations. Programs on behalf of victims which are funded by the TFV may be awarded even before a verdict has been rendered, and to all victims of crimes falling within the jurisdiction of the Court rather than victims of crimes committed by individuals who have been found guilty by it.<sup>38</sup> They are decided by the Board of Directors of the TFV whenever it “considers it *necessary* to provide physical or psychological rehabilitation or material support for the benefit of victims and their families,”<sup>39</sup> rather than when victims merit such assistance as a matter of right, as in the case

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<sup>35</sup> TFV Regulations, *supra* note 31, para. 55.

<sup>36</sup> *See id.* para. 57.

<sup>37</sup> *See* Afrol News, Peace Village for Rwandan Genocide Survivors in Construction (2000), [http://www.afrol.com/html/News/rwa008\\_victim\\_initiative.htm](http://www.afrol.com/html/News/rwa008_victim_initiative.htm).

<sup>38</sup> *See* TFV Regulations, *supra* note 31, para. 1.

<sup>39</sup> *Id.* para. 50 (emphasis added).

of reparations. This autonomous power of the TFV is to be funded through voluntary contributions from governments, intergovernmental organizations, and non-governmental organizations.<sup>40</sup>

The inspiration for such emphasis on assistance seems to be taken from various domestic victim compensation schemes, which mark a more general move away from reparations. The problem with reparations is that they remain excessively tied to the judicial process. Four ideas seem to be particularly crucial in justifying the move away from sole reliance on the reparative. First, reparations may take a long time to be awarded where victims will often need any assistance they can get as early as possible. Second, the accused will probably most of the time not have the means to pay reparations to their victims, so that something must be done to help the latter cope with the consequences of crime. Third, not all victims will be “lucky” enough to have been victimized by an individual who happens to be prosecuted and convicted by the Court, so that there is a need to do something for the great mass of other victims. Finally, there may be a public relations element to this, in which international criminal justice can ill afford to seem aloof to the needs of victims, and where some stopgap measure will be required, long before reparations might be conceivable, to secure the legitimacy of the ICC.

There is every reason to believe that the TFV may end up taking a leading role in relation to victims, particularly due to some of the limitations that are already evident in the Court’s victim participation mechanism. Indeed, some commentators have advocated that it do so as a result of it being bound by fewer rules than the Court, and the Court’s minimizing of some of the advantages of victim participation in the trials, not to mention the difficulties of obtaining reparations through domestic litigation.<sup>41</sup> The TFV “may be crucial in closing the gap between expectations of victims, who typically have both an urgent psychological need for justice and an urgent material need for support, and what the ICC itself can offer them.”<sup>42</sup> At any rate, there is no doubt that two models - one based on reparations and the other on assistance, one backward looking and guilt oriented, the

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<sup>40</sup> See *id.* para. 5.

<sup>41</sup> See PABLO DE GREIFF & MARIEKE WIERDA, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints*, in OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 225, 231 (K. de Feyter et al. eds., 2005) [hereinafter *Between Possibilities and Constraints*].

<sup>42</sup> Marlies Glasius, *What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court’s First Investigations*, 31 HUM. RTS. Q. 496, 517 (2009).

other more fluid and general - are in tension. It is this problematic and, as yet, insufficiently-theorized tension that creates various problems, but also, as will be seen, potential for ICC and TFV involvement in transitional justice efforts.<sup>43</sup>

## II. PROBLEMS ASSOCIATED WITH THE VICTIMS REGIME

Although the developments discussed above have been widely hailed as progress,<sup>44</sup> the ICC's reparations regime at this stage seems to involve a number of ambiguities and difficulties.<sup>45</sup> Crucially, neither the Court nor the TFV have made it very clear how they intend to coordinate their efforts or honor their mandates separately. The Statute of the ICC, its Rules of Procedure and Evidence and the Regulations adopted by the TFV only very partially answer the questions they were supposed to address. Reparation of this magnitude is something that has not been envisaged before and is an effort that creates very significant challenges.

### A. *Quantitative Problems*

There is, first, the problem of the scale of what the Rome institutions should be doing for victims. The ICC is designed to prosecute the worst crimes committed by the worst offenders.<sup>46</sup> In other words, it will, or should, in most cases, be dealing with mass atrocities, either ordered by the state or very significant non-state actors, often over significant amounts of time. In practice, this means that victims will often be innumerable and the harm suffered will be of the sort that is extremely difficult to compensate. To make matters more complicated, domestic concepts, such as the idea of *restitutio ad integrum*, which are often used to frame reparations issues domestically, and which are already notoriously imperfect in that context, seem almost wholly inappropriate in the international criminal environment. The breadth of victims is even greater when it comes to those dealt with by the TFV, because the victims are not only those accused of a particular act

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<sup>43</sup> See *infra* § V.

<sup>44</sup> See generally *Between Possibilities and Constraints*, *supra* note 41.

<sup>45</sup> See Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 INT'L REV. RED CROSS 409 (2008); Marc Henzelin, Viejo Heiskanen & Guénaél Mettraux, *Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes*, 17 CRIM. L.F. 317 (2006).

<sup>46</sup> See Rome Statute, *supra* note 187, art. 5.

or crime, but all those who have suffered harm as “victims of crimes within the jurisdiction of the Court. . .”<sup>47</sup>

Although it is not impossible that the TFV will amass sufficient resources from voluntary contributions to address all demands for assistance, and even contribute to reparations when the accused is insolvent, the more plausible outcome is that it will have to make do with very limited resources and find inventive ways to make the most of what resources it has.<sup>48</sup> Indeed, especially absent an obligation to contribute by states, and in a context of many competing aid priorities, it is simply unlikely that the ICC will ever be able to aid as much as might be desirable, let alone provide fully adequate reparations. This calls for very strategic planning and creativity in order to make the most of restitutions and fines, as well as voluntary contributions, while being alert to the fact that these resources will most often be very finite.

There are also, inevitably, significant distributional risks involved in the operation of such a potentially vast scheme. By distributional, I mean the risk that certain victims or classes of victims will end up being unduly privileged as a result of the ICC or the TFV’s operation. The Court will in all likelihood be the greatest culprit in this respect, as it will award reparations only to individuals or groups that have been victimized by a person convicted by it. This will inevitably create protests, especially from victims who find it hard to obtain reparations domestically. Needless to say, there is nothing particularly “meritorious” about having been the victim of someone who happens to be convicted by the Court as opposed to someone who, merely by result of not being one of the worst offenders or not being caught, has not been.

The TFV is meant to alleviate the risk that obtaining reparations will depend on the chance of having been victimized by an individual who happens to have been convicted by the ICC, in that it can provide assistance to victims who are not directly or indirectly affected by the crimes committed by the convicted person.<sup>49</sup> There is, indeed, an argument in favor of disconnecting the award of reparations from the judicial determination of guilt precisely to provide such assistance. However, the TFV will also be involved in its own huge selectivity, given the paucity of its resources and the vastness of the needs in countries where atrocities have been committed

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<sup>47</sup> See TFV Regulations, *supra* note 31, para. 1.

<sup>48</sup> In 2008, the TFV had \_3,050,000 available to deliver assistance and reparations. See ICC, Trust Fund for Victims, Current Projects, <http://www.icc-cpi.int/NR/exeres/EC1E83EC-A3B9-451F-8F6D-07D0360D48F5.htm> (last visited Apr. 12, 2010) [hereinafter Current Projects].

<sup>49</sup> See Rome Statute, *supra* note 18, art. 75.

and where victims will often number in the hundreds of thousands, if not millions. Already, TFV-funded projects suggest a large degree of selectivity which, at some point, is certain to create claims for assistance by victims whose assistance projects have not been given priority. Of course, assistance is not a right in the same way as reparations, but there will be a legitimate expectation that it be distributed in ways commensurate with needs. A further, albeit minor, distortion may be created by earmarked contributions to the TFV, as can be made, under certain conditions, by non-governmental and inter-governmental organizations.<sup>50</sup>

Finally, the Court and the TFV will almost inevitably be faced with a complex problem of management of expectations that is not simply a public relations issue, but one that goes to the heart of what it means to offer reparations and assistance. Although victims arguably participate for reasons other than obtaining reparations, such as to influence prosecutorial strategy, and with a view to ensuring the sort of conviction that will provide them with redress, it is fair to expect that reparations will often feature prominently among their motivations. The very mention of the word “reparations” to deeply aggrieved victims in the context of international criminal justice, compounded by various misunderstandings, may create expectations that the “international community” will provide reparations in most cases. The presence of the TFV on the ground may both reinforce that perception about reparations and create expectations about the substantial availability of assistance. This has the potential to create tense situations, especially if victims have been lured towards the Court as participants or, to a lesser degree, by the TFV, only to find that their “investment,” whether it be emotional or temporal, is then poorly repaid.

### *B. Qualitative problems*

A second broad range of problems created by the Rome Statute regime relates to the precise nature of what the Court and TFV can provide to victims. This is particularly striking when it comes to the list of available reparations, which has a predominantly economic or material focus, and seems to fall short of some of the reparations that have been considered standard by human rights bodies. The ICC Statute anticipates that the Court can order reparations in the form of “restitution, compensation and rehabilitation.”<sup>51</sup> Restitution would typically involve the restitution of property, although it might be broader. Compensation is generally understood to refer to economically assessable damage. The emphasis on expert assessment of

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<sup>50</sup> See TFV Regulations, *supra* note 31, para. 21(a).

<sup>51</sup> Rome Statute, *supra* note 17, art. 75(2).



“any damage, loss and injury”<sup>52</sup> suffered by victims does not particularly point to the more symbolic sort of harm which satisfaction seeks to remedy. “Award[s] for reparations” clearly seem to be financial in nature, at least when they are to be “deposited with the Trust Fund;”<sup>53</sup> it is hard to imagine a satisfaction measure being “deposited.” The language of “disbursement” and the idea that awards must be “received” by victims also point to a largely financial logic at work.<sup>54</sup>

One can only speculate as to why this emphasis exists, but it may have something to do with domestic models, the general trend of domestic and transnational litigation towards monetary remedies and the tangible character of financial awards. Missing from the Rome Statute’s list are more clearly symbolic forms of reparation, such as satisfaction and guarantees of non-repetition, despite those being considered standard under human rights law.<sup>55</sup> The reasons why satisfaction, and non-repetition, for that matter, are not mentioned in the ICC legal regime, even though they are a hallmark of other reparations regimes and are considered mandatory by international law,<sup>56</sup> are complex and, to a degree, at least, impenetrable.<sup>57</sup>

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<sup>52</sup> ICC Rules, *supra* note 2, Rule 97(2).

<sup>53</sup> *Id.* Rule 98.

<sup>54</sup> See TFC Regulations, *supra* note 31, paras. 59, 65-58.

<sup>55</sup> See generally DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (1st ed. 1999); HENRY J. STEINER, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (3d ed. 2008)

<sup>56</sup> Indeed, some of the literature on the ICC seems to take satisfaction so much for granted as part of the ordinary package of reparations that it asserts, as an article of faith, that the ICC can order satisfaction measures. See, e.g., AMNESTY INT’L, *The International Criminal Court: Fact Sheet 6 - Ensuring Justice for Victims*, § 3, AI Index IOR 40/07/00.

<sup>57</sup> I have not been able to locate a single trace of this debate occurring in the context of the Rome Conference or the adoption of the Rules or subsequent Regulations. My impression is that we are dealing with a typical discreet and not totally thought-out omission. Some of the more significant treatments of the ICC reparations regime obviously skirt the issue. Pablo de Greiff and Marieke Wierda argue in passing that satisfaction and non-repetition were not included “presumably because they originate from the law of state responsibility.” Marieke Wierda & Pablo de Greiff, *Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims*, Int’l Ctr. for Transitional Justice [ICTJ], 3 n.4 (2000), <http://www.ictj.org/static/TJApproaches/Prosecutions/RepICCTrustFund.eng.pdf>. However, such an argument does not really address the issue of why what is deemed essential in one regime cannot be incorporated in another. It may be that there is a problem with ordering individuals, as opposed to states, to provide satisfaction, for example, by ordering a perpetrator to apologize to his or her victims.

At any rate, although victims may be interested in some form of monetary reparation, it is important not to limit their needs to that sole dimension. Monetary reparations have several limitations. They can, in some cases, be somewhat ephemeral, their restorative content exhausted by the fact of their being awarded. Typically, monetary reparations tend to be oriented towards the past rather than the future. Of course, the money received for the purposes of reparation will be used to improve the individual and collective futures of victims, but without more it is unlikely to leave much of a concrete legacy. Indeed, monetary reparations can, especially in certain cultural, social and political contexts, have a trivializing effect on suffering, at least if given in isolation. Victims of atrocities themselves are not necessarily keen on financial reparations as much as they are on a fundamental recognition of the harm done to them.<sup>58</sup>

Nevertheless, more symbolic-oriented reparations and assistance are conceivable. For example, in the lead-up to the Rome Conference, a broad view of reparations generally held sway. An amendment, submitted in 1997 by France, referred to “. . . appropriate forms of reparation, *such as* restitution, compensation and rehabilitation . . . .”<sup>59</sup> The inclusion of the words “such as” suggests that, at this relatively late stage, the list was not meant as limitative.<sup>60</sup> Indeed, there would be something a little paradoxical

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Whilst it is possible to deprive an individual of something (most notoriously, for example, of his or her freedom) as punishment, it remains much more difficult, under liberal criteria, to justify ordering and possibly even forcing an individual to positively do something. It seems here that freedom of thought, including the freedom to not repent, is something that modern humanism is attached to.

<sup>58</sup> It is worth noting, however, that this is highly culturally and psychologically sensitive. There is a risk of romanticizing the “victim other,” particularly the victim from the Global South, as not demanding money. There is a further risk of monetary reparations being portrayed as typically “Northern,” a manifestation, perhaps, of a predominantly materialist culture. There is no doubt that, in some cases, victims will consider that some form of “blood money” is very much an entitlement, especially in environments that do not neatly distinguish between criminal and civil liability, and where the latter forms part of the “punishment” of perpetrators.

<sup>59</sup> U.N. Gen. Assembly [GAOR], Preparatory Comm. on the Establishment of an Int’l Criminal Court, *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, at 123, U.N. Doc. A/AC.249/1998/L.13 (Feb. 4, 1998) (emphasis added).

<sup>60</sup> An alternative proposal mentioned that “[t]he Trial Chamber shall, in accordance with this Statute and the Rules of the Court, determine whether a monetary award, *or any other award* by way of reparations, should be made against a convicted person” and suggested that “[a]n order for reparations may include . . . any other order which the Court considers appropriate.” *Id.* (emphasis added).

about the Court being in a position to order relatively more drastic material reparations, but not symbolic ones. In fact, if one were to push the argument a little bit, one could say that the Court will already be providing satisfaction through its judgments<sup>61</sup> and that, in a larger sense, international criminal justice should be in the business of providing whatever satisfaction it can, especially when it can do so at relatively little cost. In its first draft Victims Strategy document, the Court has shown that it is well aware of its limitations and that its “broad mandate leaves room” for reparation that could include “symbolic or other measures that could promote conciliation within divided communities.”<sup>62</sup>

“Rehabilitation” more explicitly straddles the economic/non-economic divide, in that it refers to various forms of assistance (e.g., medical, psychological, or social) that victims may receive.<sup>63</sup> Rehabilitation may, of course, be ordered by the ICC qua reparations, or may be sponsored by the TFFV qua assistance. Incidentally, by the assistance stage, victims may be thoroughly confused about what the basis is for receiving aid. Indeed, the TFFV is clearly more suited to transcend monetary biases, especially when acting out of its own initiative; if ever there was any suggestion that the ICC might make strictly monetary reparations, there is certainly no doubt that the TFFV will not be signing checks directly to victims. So far, many of the actions of the TFFV in terms of delivering assistance have been more in the way of rehabilitation. Of the 42 current projects involving Northern Uganda and the Democratic Republic of the Congo that have been submitted by the TFFV to the Chambers of the ICC for approval, all request the

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<sup>61</sup> It is particularly the Inter-American Court that has found that its judgments provide, by themselves, a measure of satisfaction. Although such thinking is a bit of a conceptual trick, it does capture an obvious, if not quite always intended as such, finality of criminal judgments. Of course, in the ICC context, judgments are not rendered *for* the victims as such, although there are references in the Preamble to the Rome Statute to victims being among the more obvious objective beneficiaries of international criminal justice. See Rome Statute, *supra* note 17, at 1. However, it would cost the Court next to nothing in its judgments to highlight the extent to which the judgments are rendered, at least in part, with that objective in mind.

<sup>62</sup> Draft ICC Strategy in Relation to Victims 29 (Aug. 18, 2008) (on file with author) [hereinafter Draft ICC Strategy].

<sup>63</sup> This is the general definition of rehabilitation, and it is also the understanding of several sources in the ICC context. See TFFV Regulations, *supra* note 31, para. 50(a)(i) (discussing use of the TFFV Trust Fund when “the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families . . .”).

provision of psychological support, physical rehabilitation and material support for specific groups, such as ex-child soldiers or mutilated victims.<sup>64</sup>

Even rehabilitation, however, has its limits. The overarching emphasis in the context of the TFV's autonomous policy (and there is reason to think the same would be true of the TFV's policy as implementer of reparations orders) seems to be on a welfare/clinical approach to rehabilitation, which emphasizes personal and community recovery but tends so far to elude how that recovery might be linked to broader societal searches for justice in post-conflict environments. For example, the TFV Regulations speak of "rehabilitation or material support,"<sup>65</sup> and projects have included reconstruction of victimized villages or plastic surgery for those who suffered disfigurements in the course of crimes. Sadly, there are not many signs so far that the Court or TFV will engage in forms of reparations or assistance directed at encouraging reconciliation, commemoration and truth telling.

Another qualitative problem is linked to the degree to which victim-oriented efforts should be participatory in nature. In terms of reparations, victim's movements have traditionally been at the forefront, with substantial benefits to the victims, at times, against reluctant authorities.<sup>66</sup> There is a strong link between the idea of victim participation and victim reparations, as is clear from the fact that victims have to establish their qualifications on the basis of harm suffered, and that the standard form requires them to evaluate that harm.<sup>67</sup> The possibility of victim participation before the Court ensures that their expectations will be known when it comes to reparations. In terms of the TFV, the focus is also quite clearly participatory, but in a fundamentally different way. The Board of Directors of the TFV "may consult victims . . . and, where natural persons are concerned, their families, as well as their legal representatives."<sup>68</sup> The Board has already shown a commendable willingness to communicate with relevant populations and seek their opinions. Nevertheless, this is not a legal participation in the sense that such participation is understood before the

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<sup>64</sup> Current Projects, *supra* note 48.

<sup>65</sup> TFV Regulations, *supra* note 31, para. 50.

<sup>66</sup> See HEIDY ROMBOUTS, VICTIM ORGANISATIONS AND THE POLITICS OF REPARATION: A CASE-STUDY ON RWANDA (2004).

<sup>67</sup> See ICC, Standard Application Form to Participate in Proceedings Before the International Criminal Court for Individual Victims and Persons Acting on their Behalf, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Participation/Forms.pdf> (last visited Apr. 12, 2010) [hereinafter Victim Participation Form].

<sup>68</sup> TFV Regulations, *supra* note 311, para. 49.

ICC. It is a much more informal form of participation that takes its cue from, for example, models of participatory development. However, for both the ICC and the TFV there is no guarantee that participation at, respectively, reparations hearings and TFV calls for proposals will result in the demands of victims being fully taken into account. The Court and the TFV ultimately remain the ones to decide, and they may occasionally frustrate victims' aspirations. Moreover, in both cases, there is always a risk that the emergence of a significant international structure designed to cater to victims' needs might crowd out the victims' own efforts at making their voices heard.

### C. *Scope Problems*

Scope of victim policy issues arise both *ratione personae* and *ratione temporis*. There is, first, a tension between individual and collective beneficiaries. This tension is particularly apparent when it comes to Court-ordered reparations, which can, in theory, be both individual and collective. Reparations are presented, for example, as being solicited by "a victim," rather than groups of victims, or even a single group of all victims.<sup>69</sup> The fact that victims are asked to individually fill out detailed forms devised by the Registrar outlining their individual prejudice<sup>70</sup> may also create expectations that reparations will be individual.<sup>71</sup> At this stage, it is unclear what the Court will decide, but there would be a very real danger of excessive individualization of reparations in a context where, for all the accumulation of individual suffering, the harm inflicted often targeted groups or the civilian population rather than specific individuals.

Moreover, individual reparations might reach unprecedented heights, thus magnifying the problem of inadequacy of available funds. As has already been remarked by others, there is a risk that excessively individualized reparations, by breaking the suffering of victims into disaggregated segments, will lose sight of the collective and societal dimension of experiencing mass atrocities, a suffering that can never be entirely appropriated by each victim independently, regardless of how much he or she has suffered.<sup>72</sup> There is, finally, a risk that individual reparations will create further

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<sup>69</sup> ICC Rules, *supra* note 2, Rule 94(1).

<sup>70</sup> *Id.* Rule 89; *See* ICC Regulations, *supra* note 2, Regulation 86. The "standard forms shall, to the extent possible, be made available to . . . groups of victims," but only a single victim is to fill out the form. *Id.* Regulation 86(1).

<sup>71</sup> *See* Victim Participation Form, *supra* note 67. There is definitely a contrast between the idea that collective reparations may be awarded and the fact that one has to apply for reparations individually.

<sup>72</sup> *See Between Possibilities and Constraints*, *supra* note 41, at 233.

distortions between victims, such as, for example, those that chose to participate in proceedings and those that did not. Whilst individual reparations may be an appropriate remedy in the context of international human rights tribunals where the victims are few and readily identifiable, they will typically not be well suited to the sort of mass crimes the ICC will be dealing with.<sup>73</sup>

The Statute, however, also makes it clear that collective reparations are a possibility. According to Rule 98(3), “[t]he Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.”<sup>74</sup> The Court has, in strategic documents, made it clear that it conceives of reparation as including “collective forms of reparation.”<sup>75</sup> Indeed, in terms of participation in proceedings, there are a number of other ways in which victims are encouraged to aggregate which suggest room for collective reparations.<sup>76</sup> The TFCV’s role in that respect represents an attempt to partly emancipate the reparations regime from the particulars of each individual victim. In cases where the Court does not identify the beneficiaries of an award, it will be for the Secretariat of the Trust Fund to provide “demographic/statistical data about the group of victims . . . .”<sup>77</sup> When the TFCV is acting in its autonomous capacity, moreover, it seems that its assistance will almost invariably emancipate itself from the individual. The “collective victim” thus seems like it will have its place in the Rome institutions’ victim-oriented policy, although what form either collective reparations or assistance will take is not yet clear.

There is, moreover, a *ratione temporis* tension between backward-looking initiatives and what might be described as more clearly forward-looking ones. Reparation is classically past oriented, where the quantum of reparation is calculated to compensate the harm caused. However, even reparation awards can never fully escape the future, such as, for example, when calculating lost prospects. The TFCV is in a complex situation, and the temporal position of its assistance for the benefit of victims is ambiguous. On

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<sup>73</sup> See Arturo J. Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past*, in THE HANDBOOK OF REPARATIONS 504 (Pablo de Greiff ed., 2006).

<sup>74</sup> ICC Rules, *supra* note 2, Rule 98(3).

<sup>75</sup> Draft ICC Strategy, *supra* note 62.

<sup>76</sup> For example, “where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.” ICC Rules, *supra* note 2, Rule 89(4).

<sup>77</sup> TFCV Regulations, *supra* note 31, para. 60.

the one hand, assistance is destined for victims, who are presumably defined by something that happened to them in the past, rather than classic development aid beneficiaries, who have their assistance calculated merely on the basis of *need*. On the other hand, rehabilitation is particularly interested in both the present and the future of the life experience of victims. Therefore, TFV rehabilitation efforts may have a more permanent and traceable effect than TFV assistance efforts. Nevertheless, the more “needs-oriented” TFV assistance becomes, the harder the Trust will find it to justify assisting certain victims rather than others, given the huge needs faced.

#### D. Contextual Problems

Finally, the operation of an ICC reparations regime arguably creates what one might call “contextual problems,” that is, problems that have to do with how an appropriate victim-focused policy will distinguish itself from other parallel concepts and efforts.

A first and clearly ill-conceived dimension of the reparations regime is the connection between individual guilt, on the one hand, and state, collective and international responsibility on the other. The international criminal trial process can aspire to prove the guilt or innocence of a few, and possibly their *relative* guilt, through variegated sentencing, but will perforce leave aside the guilt and relative guilt of many more. The ICC is geared towards ordering reparations as a result of having established individual guilt<sup>78</sup> and not state responsibility.<sup>79</sup> In fact, because of international criminal justice’s ontological focus on the individual, international trials have typically not been very good (and there is no reason to think that the ICC would be any better) at understanding the sort of collective and structural phenomena which inevitably lie at the heart of mass atrocities. How-

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<sup>78</sup> See ICC Rules, *supra* note 2, Rule 98(1). Even collective reparations in the ICC Rules must be related to “an award for reparations against a convicted person.” *Id.* Rule 98(3). At no point is there a suggestion that the Trust Fund could entirely emancipate itself from determinations of individual guilt and related orders for reparation by the Court. In other words, the Trust Fund is not a general reparations fund, like the U.N. Torture Victims Fund, but, for all its independence, remains subservient to the international criminal judicial process.

<sup>79</sup> See Vincenzo Militello, *The Personal Nature of Individual Criminal Responsibility and the ICC Statute*, 5 J. INT’L CRIM. JUSTICE 875 (2007); Frédéric Mégret, *Why Would States Want to Join the ICC? A Theoretical Explanation Based on the Legal Nature of Complementarity*, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY: PROCEEDINGS OF THE INTERNATIONAL ROUNDTABLE ON THE COMPLEMENTARY NATURE OF THE INTERNATIONAL CRIMINAL COURT, AMSTERDAM, 25/26 JUNE 2004 1 (Jann K. Kleffner & Gerben Kor eds., 2004).

ever, an international crime is always committed thanks to a whole machinery, which includes systems of allegiances and complicities (no one suggests that Hitler committed the Holocaust on his own, for example).

The ICC reparation regime risks reinforcing the model discussed above to the extent that the basis for reparations remains, *stricto sensu*, the determination of an individual's guilt. Although, technically, reparations owed by individuals are certainly not exclusive of state- or internationally-orchestrated reparations, there may be a potential for a "crowding effect," as international law seems to designate certain individuals as priority targets for seeking reparations. The ICC was not the only option for victims of international crimes to obtain reparations, and embedding the reparations within a regime of determination of guilt comes with its own problems. In order to avoid this, reparations should be seen as a way of collectivizing guilt and responsibility, i.e., by going beyond, when possible, the discreet crime of any particular individual to give due weight to the fact that many international crimes will have been committed collectively. In doing so, the international reparation regime can avoid some of the fictions of international criminal justice.

The intervention of the TFCV and the fact that it can provide more general "assistance"<sup>80</sup> can be seen as an informal acknowledgement that something is lost by an excessive focus on individual guilt when it comes to dealing with the actual needs of victims. Of course, voluntary contributions by states or international organizations are in no way an acknowledgement of responsibility or of an obligation to give, but there is a sense that the TFCV stands for a sort of "community interest" in no major crime going without some sort of assistance. This is, in turn, related to the idea that the difference between what a convicted person can pay, in terms of fines and restitutions, and the total harm inflicted by that person, in terms of crimes, is something that the international community should shoulder. When the convicted person is the head of state or someone in high authority, as will often be the case, ICC and TFCV policy will necessarily (and if they do not, they should) seek to partly bridge the gap between individual guilt and state responsibility. Certainly, victims should not have to pay the consequences of an artificial disaggregation of individual guilt from statist and collective criminal endeavors.<sup>81</sup>

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<sup>80</sup> See ICC Rules, *supra* note 2, Rule 98(5) ("Other resources of the Trust Fund may be used for the benefit of victims."). See also TFCV Regulations, *supra* note 31, para. 56.

<sup>81</sup> Such as would result, for example, from indexing reparations to the degree to which an accused contributed to mass atrocities, rather than the suffering resulting from those atrocities in which he or she participated.



A further challenge for the Rome victims' regime will be to sufficiently distinguish its policies from other parallel policies undertaken in the wake of atrocities. The regime was devised, and is often still spoken of, as if it were going to unfold in a political and institutional void. In fact, it will always unfold in the midst of a complex, multilayered process of both other reparation (possibly involving state responsibility, truth and reconciliation commissions, private law suits, etc.) and assistance programs involving humanitarian, reconstruction and development efforts that focus or have an impact on victims. Pablo de Greiff and Marieke Wierda have argued that reparations programs should display a form of "external coherence," which means that they must "bear a close relationship with other transitional justice mechanisms, that is, minimally, with prosecutions, truth telling, and institutional reform."<sup>82</sup> The same could probably be said of the TFFV's actions, which should be carefully coordinated with reparations efforts. For example, given the scarcity of assistance available, it might make sense to give aid or assistance as a matter of priority to those unlikely to obtain reparations.

Assistance will also have to distinguish itself from more general reconstruction efforts. If the ICC's key problem is that it is too judicial, the TFFV's problem may be that it is too much like a development agency and not enough about transitional justice. At a certain level, assistance to victims may compete with other forms of aid and, indeed, be difficult to distinguish from them. The risk is that the TFFV might become too disconnected from the overall paradigm of either international criminal or transitional justice in a way that would make it little more than one aid distributor among many. In this context, TFFV assistance cannot simply become synonymous with any political, economic, social or cultural effort to mend a society, or it will lose its specificity. Its distinguishing mark should remain that it is awarded on the basis of recognition of a certain entitlement resulting from harm suffered in the context of the commission of international crimes, which is a much more specific mission than a general effort to provide aid.

### III. THE THEORY AND PRACTICE OF "SITES OF CONSCIENCE"

In the previous section, I have highlighted what I think are some of the crucial tensions that will shape the practice of the Rome Statute's victims regime. In the process, I highlighted some of the limitations of said regime, and made some general suggestions as to what sort of tools might best address these limitations, with a particular focus on transitional justice

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<sup>82</sup> De Greiff & Wierda, *supra* note 57, at 14.

concerns. In this section, I turn to an example of something which I think could make the Court and the TFV mandates more complementary, realistic, and just when it comes to victims. Rather than deductively inferring an ideal reparations/assistance policy from the general rules of the ICC and TFV, I now turn to a particular real world practice of transitional justice arrangements, which might provide a very interesting niche for the international reparations regime's "investments," i.e., "sites of conscience," which are designed to commemorate major historical events, as well as certain atrocities.

#### A. *Monuments and Memory*

The practice of commemorating traumatic events, the "communal process of remembering and commemorating the pain and victories of the past,"<sup>83</sup> through the construction of sites of conscience is relatively widespread, albeit diverse. Perhaps the most notorious of such sites are the monuments to the dead that were constructed throughout the world following the First World War.<sup>84</sup> Still, there are many other examples of such commemoration, which memorialize more domestic tragedies such as civil war,<sup>85</sup> national disintegration,<sup>86</sup> genocide,<sup>87</sup> bloody coups<sup>88</sup> ethnosectarian

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<sup>83</sup> TRUTH AND RECONCILIATION COMM'N OF S. AFR., REPORT 95 (2003).

<sup>84</sup> See generally J. WINTER, SITES OF MEMORY, SITES OF MOURNING: THE GREAT WAR IN EUROPEAN CULTURAL HISTORY (1995).

<sup>85</sup> See generally The Henry Ford, Civil War Remembrance, <http://www.thehenryford.org/events/civilWarRemembrance.aspx> (last visited Apr. 12, 2010); Juanjo Igarua & Dario Paez, *Art and Remembering Traumatic Collective Events: The Case of the Spanish Civil War*, in COLLECTIVE MEMORY OF POLITICAL EVENTS: SOCIAL PSYCHOLOGICAL PERSPECTIVES 79 (James W. Pennebaker et al. eds., 1997).

<sup>86</sup> See generally Chloe E. Hayim, *The Burden of Memory: Reconciliation in Serbia* (2005) (unpublished dissertation, University of Bradford) (on file with author).

<sup>87</sup> See generally J. Ledgerwood, *The Cambodian Tuol Sleng Museum of Genocidal Crimes: National Narrative*, 21 MUSEUM ANTHROPOLOGY 82 (1997); Commemoration of Genocide Against the Tutsis, Memorial Sites - Rwandan 15th Commemoration of Tutsis Genocide, <http://rwanda15.org/spip.php?rubrique10> (last visited Apr. 12, 2010); The Armenian Genocide Memorial Council of Glendale, <http://www.armeniangenocidemonument.com/> (last visited Apr. 12, 2010).

<sup>88</sup> See generally In Sup Han, *Kwangju and Beyond: Coping with Past State Atrocities in South Korea*, 27 HUM. RTS. Q. 998 (2005); Teresa Meade, *Holding the Junta Accountable: Chile's "Sitios de Memoria" and the History of Torture, Disappearance, and Death*, 79 RADICAL HIST. REV. 123 (2001).

violence,<sup>89</sup> massive discrimination,<sup>90</sup> and political repression.<sup>91</sup>

At times, monuments are specifically built for commemorative purposes, at times, certain monuments are destroyed in particular symbolic ways and yet, at other times, monuments that were symbolic of the criminal regime are kept, although at counter-purpose. These monuments are evidence and reminders of the past; they seek to commemorate certain events by “embody[ing] the living memory of those who are missing - the aspiration for closure and the enormity of the trauma.”<sup>92</sup> Their inscription in space creates a commemorative geography and, in “embody[ing] memory,”<sup>93</sup> they can “serve as vehicles for the intergenerational transmission of historical memory.”<sup>94</sup> Sites of conscience are, therefore, above all about “not forgetting,” by creating special markers of suffering in the landscape.

In some cases, this attempt to preserve memory is particularly important because what was sought was the “disappearance” of certain persons. “Disappearance” is distinct from killing in that the goal is to “achieve impunity by violations . . . taking place in secret,” making it a particularly potent tool of rule by terror.<sup>95</sup> In such situations, “victims often suffer their loss in isolation with little social recognition of the injury inflicted on them. In this context, publicly memorializing the missing through . . . monuments

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<sup>89</sup> See generally Brian Graham & Yvonne Whelan, *The Legacies of the Dead: Commemorating the Troubles in Northern Ireland*, 25 ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE 476 (2007).

<sup>90</sup> See generally Erin Mosely, “Visualizing” *Apartheid: Contemporary Art and Collective Memory During South Africa’s Transition to Democracy*, 5 ANTÍPODA 97 (2007).

<sup>91</sup> See generally Nanci Adler, *In Search of Identity: The Collapse of the Soviet Union and the Recreation of Russia*, in THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES 275 (Alexandra Barahona De Brito et al. eds., 2001); Patricia Tappatá de VALDEZ, *El Pasado, un Tema Central del Presente: La Búsqueda de Verdad y Justicia como Construcción de una Lógica Democrática*, in VERDAD, JUSTICIA Y REPARACIÓN: DESAFÍOS PARA LA DEMOCRACIA Y LA CONVIVENCIA SOCIAL (Gilda Pacheco Oreamuno et al. eds, 2005).

<sup>92</sup> Vasuki Nesiah, *Overcoming Tensions Between Family and Judicial Procedures*, 84 INT’L R. RED CROSS 823, 841 (2002).

<sup>93</sup> Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition*, in THE HANDBOOK OF REPARATIONS 560, 567 (P. de Greiff ed., 2006).

<sup>94</sup> Elizabeth Jelin, *Public Memorialization in Perspective: Truth, Justice and Memory of Past Repression in the Southern Cone of South America*, 1 INT’L J. TRANSITIONAL JUST. 138, 147 (2007).

<sup>95</sup> Nesiah, *supra* note 92.

can have enormous symbolic value in acknowledging the missing.”<sup>96</sup> For example, in the Santiago General Cemetery in Chile, a “Memorial for the Disappeared” was erected, which includes the names of “more than three thousand people disappeared and murdered” after the coup.<sup>97</sup>

Sites of conscience also seem ideally suited to the needs of societies where the destruction of memory has been the very aim of atrocities. There may be a profound connection between the erection of new commemorative monuments and the fact that monuments, commemorative or otherwise, were destroyed as part of the commission of atrocities, such as in attempts to destroy collective memory. As J. Müller put it, during the Yugoslav wars, “[m]emory was literally blown up, as monuments, mosques and other concrete manifestations of collective memory were erased . . . .”<sup>98</sup> It is as a result of this that “mnemonic maps were rewritten as normative maps for an ethnically reconfigured future.”<sup>99</sup> The construction of memorial sites in this context can be an attempt to recuperate the memory of something in particular, but it can also serve as an attempt to reclaim memory itself. To use Pierre Nora’s expression, these are “lieux de mémoire,” sites “where memory crystallizes and secretes itself,” partly because memory has ceased to exist and, therefore, needs to be reconstituted.<sup>100</sup>

### B. Monuments and Transitional Justice

More generally, sites of conscience are perhaps significant *tools of transitional justice*. As Artemis Christodoulou put it, “the struggle for control over the national or ‘collective’ memory lies at the heart of post-conflict or post-authoritarian accountability policies.”<sup>101</sup> The commemoration of the past, in other words, is not just an end in itself, but part of complex

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<sup>96</sup> *Id.*

<sup>97</sup> Meade, *supra* note 88, at 131.

<sup>98</sup> Jan-Werner Müller, *Introduction: The Power of Memory, the Memory of Power and the Power over Memory*, in *MEMORY AND POWER IN POST-WAR EUROPE: STUDIES IN THE PRESENCE OF THE PAST* 1, 17 (Jan-Werner Müller ed., 2002).

<sup>99</sup> *Id.*

<sup>100</sup> Pierre Nora, *Between Memory and History: Les Lieux de Mémoire*, 26 *REPRESENTATIONS* 7 (1989).

<sup>101</sup> ARTEMIS CHRISTODOULOU, *SIERRA LEONE TRUTH AND RECONCILIATION COMM’N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION*, APPENDIX 4 (2004), para. 2, available at <http://www.sierra-leone.org/TRCDocuments.html> (follow “Appendices” hyperlink) (last visited Apr. 12, 2010) [hereinafter Appendix 4]. See also Jelin, *supra* note 94 (speaking of the “. . . constant interaction between state and societal actors in the struggle for understanding and interpreting past violence and repression.”).

processes of transitional justice that have been analyzed relatively early on in terms of not just remembering, but also apportioning guilt, highlighting truth, and facilitating reconciliation.<sup>102</sup> Although typically not vindictive or vengeful, sites of conscience often designate the authors of atrocities, either implicitly or explicitly. They contain either complex or distilled truths about an event or a period, its causes and its consequences. By serving as rallying and meeting points, they can also contribute to reconciliation and be seen as “attempts to reaffirm a feeling of collective belonging and an identity rooted in a tragic and traumatic history.”<sup>103</sup> In some cases, commemorative monuments can act as “counter-monuments” to some earlier attempts to monumentally glorify, for example, nationalist ambition.<sup>104</sup>

Monuments are also tools of transitional justice in a more sophisticated way. A whole stream of literature sees such sites as not simply “product,” but rather as “process.”<sup>105</sup> The process of coming to terms with the past and determining what should be the best sort of monument is itself part of the healing. As one author notes, the building of monuments leads to “largely symbolic struggles over different ways in which historical events should be remembered.”<sup>106</sup> Monuments in transitional justice efforts serve “as a tool of participatory remembrance,”<sup>107</sup> especially where the fight over

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<sup>102</sup> See NEIL J. KRITZ, *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES XIX-XXX* (1st ed. 1995). “Following the initial phase of transition, this history may be reaffirmed in the long-term through . . . the construction of museums and commemorative monuments.” *Id.* at xxvi.

<sup>103</sup> Jelin, *supra* note 94.

<sup>104</sup> On the use of the Kosovo Polje monument as a symbol of Serbian ambitions, see Karen E. Till, *Places of Memory*, in *A COMPANION TO POLITICAL GEOGRAPHY* 289, 289-301 (John A. Agnew et al. eds., 2003).

<sup>105</sup> As Artemis Christodoulou put it, “[m]emorialising is a social and political act that encompasses not just the memorial itself, but also the process of creating the memorial, the creation of the memorial and the continued engagement with the memorial.” Appendix 4, *supra* note 101, para. 3.

<sup>106</sup> Neil J. Smelser, *Psychological Trauma and Cultural Trauma*, in *CULTURAL TRAUMA AND COLLECTIVE IDENTITY* 31, 50 (2004).

<sup>107</sup> Joanna Quinn, *The Role of Informal Mechanisms in Transitional Justice* 4 (2005) (working paper), available at <http://www.cpsa-acsp.ca/papers-2005/Quinn.pdf>. See also MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 140 (1998). Martha Minow describes the way that memorials to victims of conflict can “occasion the productive if painful kind of struggle for memory as do fights over reparations. Vividly capturing and recasting memory, fights over monuments in the streets and in debates usefully disturb congealed memories and mark important junctions between the past and a newly invented present.” *Id.*

monuments and their symbolism was a substantial part of the conflict itself.<sup>108</sup> Memorials can also help to “humanize and re-politicize the victims.”<sup>109</sup> Obviously, building monuments cannot be a substitute for a complex process of reckoning with the past,<sup>110</sup> but it can help to crystallize debates around a number of stylized dilemmas. The construction of monuments can also be a way to encourage civil society appropriation<sup>111</sup> and ensure that commemoration is compatible with local culture.<sup>112</sup>

Finally, there is clearly a forward-looking, future-oriented dimension to commemorative monument building. Monuments stand as implicit condemnations of the faults of a past regime. They act as a reminder for future generations of certain dangers and places through which “contemporary dreams of national futures are imagined.”<sup>113</sup> “By stimulating an ongoing dialogue necessary for building and sustaining a peaceful, democratic society after long periods of violence and repression,” argues Artemis Christodoulou, “memorials may serve as catalysts for social change.”<sup>114</sup> As one author put it:

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<sup>108</sup> See generally Brandon Hamber & Grainne Kelly, *A Place for Reconciliation? Conflict and Locality in Northern Ireland*, Democratic Dialogue Report 18 (Democratic Dialogue, Belfast, Ir.), Sept. 25, 2005, available at <http://cain.ulst.ac.uk/dd/report18/ddreport18.pdf>.

<sup>109</sup> Katherine Hite, ‘The Eye that Cries’: *The Politics of Representing Victims in Contemporary Peru*, 5 A CONTRACORRIENTE 108, 130 (2007), available at [http://www.ncsu.edu/project/acontracorriente/fall\\_07/Hite.pdf](http://www.ncsu.edu/project/acontracorriente/fall_07/Hite.pdf).

<sup>110</sup> See Graham & Whelan, *supra* note 89, at 476 (discussing the dangers of putting commemoration before actual reconciliation). See also Alexander Segovia, *The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A History of Noncompliance*, in THE HANDBOOK OF REPARATIONS 154, 160 (Pablo de Greiff ed., 2006).

<sup>111</sup> See Appendix 4, *supra* note 101, para. 16 (“There is an important citizenship role in memorials that is often lacking from high-level strategies that risk alienating those they seek to help by complex legal or bureaucratic procedures. There is more public resonance in an accessible and enduring public space than in a lengthy piece of statistical analysis of human rights violations.”).

<sup>112</sup> See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 196 (2002) (discussing the possibilities of commemorating the Cambodian genocide in a way that is consonant with Buddhist beliefs). See also Appendix 4, *supra* note 101, para. 21-22. (“Establishing a successful memorial in Sierra Leone requires the integration of traditional and cultural methods of memorialisation into the more generalized scheme” of memorialisation.). *Id.* para. 21.

<sup>113</sup> KAREN E. TILL, THE NEW BERLIN: MEMORY, POLITICS, PLACE 193 (2005).

<sup>114</sup> Appendix 4, *supra* note 101, para. 13.

A memorial constitutes a warning about hazardous developments in the here and now or in the future by means of referring to the past. A memorial is a means to (re)write history – which has often been distorted or denied. A memorial may be an important element in preventing future violations of human rights.<sup>115</sup>

By the same token, the role of sites of memory is not to impose a particular memory, but often to create an occasion for memorializing. It has been said of the Hector Pieterse memorial in Soweto (named for a 12 year-old schoolboy who was one of the first victims of police repression during a riot), that “[i]t is a unique space where contemporary South Africans and future generations can contemplate memories both painful and problematic, providing its visitors with multiple and even conflicting narratives that allow for a more complex understanding of our role in shaping the future.”<sup>116</sup> In light of all of the above, it is not surprising that the absence of such “lieux de memoire” is often seen as a substantial obstacle to the construction of a collective memory that might allow a society to surmount past grievances.<sup>117</sup>

### C. Monuments and Victims

As tools of transitional justice, there is no doubt that commemorative monuments have a particular value for victims and their relatives, and that this value is itself integral to the larger transitional justice efforts.<sup>118</sup>

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<sup>115</sup> Daan Bronkhorst, *‘Truth and Justice’: A Guide to Truth Commissions and Transitional Justice*, 57 (2d ed. 2006), available at [http://www.amnesty.nl/documenten/truth\\_and\\_justice.pdf](http://www.amnesty.nl/documenten/truth_and_justice.pdf).

<sup>116</sup> Ali Khangela Hlongwane & Angel David Nieves, *supra* note 29, at 366. See also Int’l Conf. of the Red Cross & Red Crescent [ICRC], *The Missing and Their Families: Action to Resolve the Problem of People Unaccounted for as a Result of Armed Conflict or Internal Violence and to Assist their Families*, 03/IC/10, Dec. 2-6, 2003, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDJR/\\$File/ICRCreport\\_theMissing\\_ANG\\_FINAL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDJR/$File/ICRCreport_theMissing_ANG_FINAL.pdf) [hereinafter ICRC Report].

<sup>117</sup> See generally KASPER BLOCH-JØRGENSEN ET AL., *ACHIEVING RECONCILIATION IN LEBANON?* (May 2006) (dissertation, Roskilde Universitetscenter), available at <http://rudar.ruc.dk/bitstream/1800/1833/1/Achieving%20Reconciliation%20in%20Lebanon%20-%20Færdigt%20projekt.pdf>.

<sup>118</sup> Even outside the judicial context, the building of such monuments has often been “conceived as part of the moral reparations for, and vindication of, the victims.” ELIZABETH LIRA, *The Reparations Policy for Human Rights Violations in Chile*, in *THE HANDBOOK OF REPARATIONS* 55, 62 (Pablo de Greiff ed., 2006).

As has been mentioned, victims will often be in need of something quite different than purely financial reparations or assistance. A widespread tendency is to assume that victims want monetary compensation above all. In fact, sociological research has shown that, in some transitional scenarios, demands or offers for money can raise delicate problems, including “a certain sense of guilt for demanding a payment of money,”<sup>119</sup> especially in the case of disappearances.<sup>120</sup> Historically, victims have been very interested and, at times, even more interested, in non-monetary forms of reparations, such as satisfaction and guarantees of non-repetition.<sup>121</sup> To highlight the importance of such reparations is also to emphasize the extent to which victims are not simply “economic,” but also social and political beings, who have at heart not simply their own fate, and not simply the extent to which they can obtain financial help, but also an interest in broader transitional justice processes. That there is strong interest for non-monetary reparations is evident in the way victims themselves frequently insist on the construction of monuments, often putting pressure on the state<sup>122</sup> or demanding such reparations from international institutions.

The very existence of commemorative monuments is a tribute to the victims and becomes “part of a process of ‘redress,’” or healing.<sup>123</sup> The commemoration of suffering and victims’ lives is a significant and possibly quite contemporary departure from an earlier trend of “statues and plaques commemorating war heroes,” in which memorials are “increasingly being conceived as challenges to rather than as bulwarks of dominant discourses of collective memory.”<sup>124</sup> Monuments “provide an avenue for acknowledgment that may be particularly significant in meeting families’ needs to memorialize their loved ones and the extent of the loss suffered by them and their communities.”<sup>125</sup> In such cases:

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<sup>119</sup> MARIA JOSÉ GUEMBE, *Economic Reparations for Grave Human Rights Violations: The Argentinean Experience*, in THE HANDBOOK OF REPARATIONS 21, 37 (Pablo de Greiff ed., 2006)

<sup>120</sup> See *id.* at 37-38.

<sup>121</sup> See *id.* at 38.

<sup>122</sup> For example, in El Salvador, “human rights NGOs have joined together and in 1998 persuaded San Salvador’s mayor to set aside part of the city’s Cuscatlán Park for a monument to the civilian victims of the war.” U.S. INST. PEACE, EL SALVADOR: IMPLEMENTATION OF THE PEACE ACCORDS 13 (Margarita S. Studemeister ed., 2001), available at <http://www.dplf.org/uploads/1190927825.pdf>.

<sup>123</sup> BRONKHORST, *supra* note 115, at 57.

<sup>124</sup> Appendix 4, *supra* note 101, para. 7.

<sup>125</sup> Nesiah, *supra* note 92, at 840.



For the relatives the monument has special significance. In addition to rehabilitation, it also has a humanizing function. Victims of human rights violations from the past are often anonymous: the dead, the 'disappeared' person. A monument turns this abstract category into concrete and personal victims. The victims become people of flesh and blood.<sup>126</sup>

Monuments can also have a significant role in "restoring the good name of victims" in cases where a historical legacy has tarnished that name.<sup>127</sup>

Among the most convincing descriptions of the way in which sites of conscience can help victims is Yael Danieli's extrapolation from the words of Elie Wiesel that victims of the many atrocities "have no cemetery; we are their cemetery."<sup>128</sup> In that respect, according to Danieli:

Building monuments serves some important functions in the reestablishment of a sense of continuity for the survivors, and for the world. Much of the chronic grief, the holding on to the guilt, shame, and pain of the past have to do with these internally carried graveyards. Survivors fear that successful mourning may lead to letting go, thereby to forgetting the dead and committing them to oblivion. The attempt to make these graveyards external creates the need for building monuments so that the survivors might have a place to go to remember and mourn in a somewhat traditional way.<sup>129</sup>

Danieli cites the Yad Vashem as an example of such a monument, and indeed the Yad Vashem has served a crucial role as a focal point in remembering the victims of the Holocaust, for example, with the "memory room" and the "name room," while at the same time serving as a shrine, memorial, art gallery, archive, research centre, library and museum.<sup>130</sup>

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<sup>126</sup> Bronkhorst, *supra* note 115, at 58. See also HAMBER, *supra* note 93, at 566.

<sup>127</sup> See ANDREW RIGBY, JUSTICE AND RECONCILIATION AFTER THE VIOLENCE 10 (2001).

<sup>128</sup> Yael Danieli, *Essential Elements of Healing After Massive Trauma: Complex Needs Voiced by Victims/Survivors*, in HANDBOOK OF RESTORATIVE JUSTICE 343, 352 (Dennis Sullivan & Larry Tifft eds., 2006).

<sup>129</sup> *Id.*

<sup>130</sup> See *id.*

Concretely, sites of remembrance provide places of mourning, reminiscence and contemplation for victims and their relatives,<sup>131</sup> and thus are of very direct use to those who might be deprived of them otherwise, such as people who do not have a tomb.<sup>132</sup> They are also a way of meshing the private and the public, the individual and the collective, in a way that can give meaning to suffering and highlight solidarity with victims.<sup>133</sup> In many ways, sites of remembrance can help extend the circle of victims to a number of people who may not have been victimized directly as a result of atrocities, but who will have suffered immensely from them.

The strong connection that victims and their relatives have with monuments is also highlighted in the way that their presence and participation in the design of monuments is felt to be particularly necessary. As Vasuki Nesiah put it, “memorials are most likely to be sources of healing and closure for the families if the families of the missing are consulted in their design and implementation.”<sup>134</sup> In practice, demands for the construction of commemorative sites have often come from victims and their organizations themselves, whether in Ethiopia,<sup>135</sup> Chile,<sup>136</sup> or Bosnia.<sup>137</sup> Indeed, there has been a noticeable phenomenon in the re-appropriation of the design of monuments by civil society in general,<sup>138</sup> to the point that one author

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<sup>131</sup> See HAMBER, *supra* note 93, at 566 (Such sites are “focal points in the grieving process.”).

<sup>132</sup> See WINTER, *supra* note 84.

<sup>133</sup> See Catherine Moriarty, *Private Grief and Public Remembrance: British First World War Memorials*, in *WAR AND MEMORY IN THE TWENTIETH CENTURY* 125, 126 (Martin Evans & Ken Lunn eds., 1997).

<sup>134</sup> Nesiah, *supra* note 92, at 841.

<sup>135</sup> See University of Minnesota Human Rights Library, *The Status of Human Rights Organizations in Sub-Saharan Africa Ethiopia*, <http://www1.umn.edu/humanrts/africa/ethiopia.htm> (last visited Apr. 12, 2010) (discussing Anti-Red Terror Committee, an Ethiopian NGO established in 1991 to represent the victims and families of human rights abuses perpetrated by the Mengistu regime. One of its key goals has been the building of a monument to commemorate the victims of “Red terror.”).

<sup>136</sup> See Victoria Baxter, *Civil Society Promotion of Truth, Justice, and Reconciliation in Chile: Villa Grimaldi*, 30 *PEACE & CHANGE* 120, 126 (2005). See also Lira, *supra* note 118.

<sup>137</sup> See Women’s Feminist – Antimilitarist Peace Organization, *Don’t Ever Forget the Genocide in Srebrenica*, [http://www.zeneucnom.org/index.php?option=com\\_content&task=view&lang=en&id=462](http://www.zeneucnom.org/index.php?option=com_content&task=view&lang=en&id=462) (last visited Apr. 12, 2010).

<sup>138</sup> See Mark H. Oseil, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 653 (1995) (“... whereas war memorials were long secretly designed by elites, today the form that they should take is routinely de-

has argued that “[e]ach and every decision to build a monument, to set up spaces for memory in places where serious affronts to human dignity were committed . . . is the result of the initiative and the commitment of social advocacy groups that act as memory entrepreneurs.”<sup>139</sup> This is, therefore, clearly something that victims’ families feel strongly about.

Finally, it should be stressed that monuments are also about recognition of responsibility, typically of the state or state officials, and, therefore, make a point “about those giving or granting” reparations.<sup>140</sup> Their construction and their symbolism “tienen que ver no sólo con el conocimiento *sino sobre todo con el reconocimiento público y oficial sobre los hechos del pasado*.”<sup>141</sup> Hence, the importance of memorializing is emphasized because “the very act of public acknowledgement of suffering contributes significantly to the healing process.”<sup>142</sup> It must be said in this respect that monuments, which, as will be seen in the next section, typically fall under the heading of “satisfaction” as a form of reparation, provide evidence of a commitment to non-repetition, another form of reparation.<sup>143</sup> They may provide opportunities for those individually responsible to express remorse at the pain caused.

#### IV. MONUMENTS AS REPARATION AND ASSISTANCE: THE RECORD

Saying that the building of sites of conscience is a common practice, and that such sites are important tools of transitional justice bearing particular relevance to victims, is not the same thing as fitting them into practices of either reparation or assistance. After all, given the meager amount of both reparation and assistance money available, it may be that funds for building monuments should come from other sources than the Rome institutions. Indeed, in response to the TFV’s suggestion that it might be involved in “reconciliation” efforts, which, one presumes, might include

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bated in society at large and in the local communities that often sponsor and house them.”).

<sup>139</sup> ELIZABETH JELIN, *STATE REPRESSION AND THE LABORS OF MEMORY* 39 (Judy Rein & Marcial Godoy-Anativia trans., Univ. Minn. Press 2003).

<sup>140</sup> HAMBER, *supra* note 93, at 566.

<sup>141</sup> Their construction and their symbolism “have to do not only with knowledge but, above all, with public and official recognition of what was done in the past.” MARCELA CEBALLOS, DEPARTAMENTO NACIONAL DE PLANEACIÓN, REPÚBLICA DE COLOMBIA, *EL PAPEL DE LAS COMISIONES EXTRAJUDICIALES DE INVESTIGACION Y DE LAS COMISIONES DE VERDAD EN LOS PROCESOS DE PAZ: ASPECTOS TEÓRICOS Y EXPERIENCIA INTERNACIONAL* 9 (2002) (emphasis added).

<sup>142</sup> Appendix 4, *supra* note 101, para. 3.

<sup>143</sup> HAMBER, *supra* note 93, at 567.

the building of commemorative sites, one group of NGOs suggested that reconciliation “is not necessarily a victim-centered activity.”<sup>144</sup>

Historically, the construction of commemorative monuments has had a noticeable, albeit marginal, overall role in the theory of reparation, particularly as a form of symbolic reparation. This is obviously not to say that the construction of such monuments cannot be fit into a broader practice of victim-oriented “assistance” as will be managed by the TFV. In this section, I will examine three sources of the idea that commemorative monuments are a type of reparation: the UN’s work on reparation principles, the work of truth and reconciliation commissions and the Inter-American Court’s practice.

#### A. *Monuments as Victim Reparation*

##### 1. The UN’s Work on Reparation

The Victims Declaration is notable for incorporating an element of “satisfaction” as reparation by including, aside from restitution, both compensation and rehabilitation.<sup>145</sup> Satisfaction, which has been described as the “[l]esser known . . . manner of providing reparations,”<sup>146</sup> refers to a number of measures whose goal is to tackle the more emotional, psychological, and even symbolic aspects of victims’ suffering.<sup>147</sup> These can include a whole series of measures such as formal apologies accompanied by actions that aim to raise public awareness of the atrocity committed. Such actions may include research, education and impartial mass communication, as well as funds to support all of these and, of course, the establishment of memorial days or monuments.<sup>148</sup>

Very tellingly, satisfaction measures have also been held to incorporate the construction of the actual “sites of conscience” which are the object of this article. The van Boven study affirms that reparations include satisfaction which, in turn, includes “[c]ommemorations and tributes to the victims . . . .”<sup>149</sup> The Joinet report refers to “[c]ommemorative ceremonies,

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<sup>144</sup> *Comments on Global Strategic Plan*, *supra* note 8, at 3.

<sup>145</sup> See Victims Declaration, *supra* note 28.

<sup>146</sup> Richard Falk, *Reparations, International Law, and Global Justice: a New Frontier*, in THE HANDBOOK OF REPARATIONS 478, 483 (Pablo de Grieff ed., 2006).

<sup>147</sup> See *id.*

<sup>148</sup> See Max du Plessis, *Reparations and International Law: How are Reparations to be Determined (Past Wrong or Current Effects), Against Whom, and What Form Should they Take?*, 22 WINDSOR Y.B. ACCESS TO JUST. 41, 68-69 (2003).

<sup>149</sup> *Van Boven Report*, *supra* note 27, para. 22(g).

naming of public thoroughfares or the erection of monuments,”<sup>150</sup> and Bassiouni mentions “[c]ommemorations and tributes to the victims . . . .”<sup>151</sup> It is that last formulation that made its way into the General Assembly resolution.<sup>152</sup> The Joinet report is noteworthy for highlighting the need for collective measures.<sup>153</sup> It emphasizes that, “[o]n a collective basis, symbolic measures intended to provide moral reparation, such as formal recognition by the State of its responsibility, or official declarations aimed at restoring victims’ dignity . . . help to discharge the duty of remembrance.”<sup>154</sup> The UN’s work has influenced a number of domestic and regional bodies. For example, a draft EU Recommendation for Assistance to Victims of Acts of Terrorism indicates that “[m]ember states are encouraged . . . to consider taking other [reparative] measures [including] . . . [c]ommemorations and tributes to the victims and first responders.”<sup>155</sup>

## 2. The Inter-American System Experience

Although the record of truth and reconciliation commissions in dealing with “sites of conscience” remains limited because of their often-limited powers, there is at least one instance of a court becoming heavily involved in ordering the construction of various monuments as reparations.

The Inter-American Court of Human Rights is by far the most active international body in considering that some form of monument construction can constitute an appropriate form of reparation. The ground has been prepared by a clear awareness that “damages should be compensated not only in monetary terms, but also through measures that show the relatives and . . . society that events such as these are not going to recur.”<sup>156</sup> “Moral damages,” in particular, “involve making reparation to the individuals for the pain and suffering inflicted on them.”<sup>157</sup> In the judgments of the Inter-American Court, such compensation often comes under the heading “other forms of reparation,” and typically designates compensation that extends “beyond emotional distress to encompass other prejudicial effects on

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<sup>150</sup> *Joinet Report*, *supra* note 27, para. 42.

<sup>151</sup> *Bassiouni Report*, *supra* note 27, para. 25(g).

<sup>152</sup> Victims Declaration, *supra* note 28, para. 22(g).

<sup>153</sup> *See Joinet Report*, *supra* note 27, para. 40.

<sup>154</sup> *Id.* para. 42.

<sup>155</sup> Proposal for EU Recommendation for Assistance to Victims of Acts of Terrorism 6 (2008), [http://www.euforumrj.org/readingroom/Terrorism/Desvict\\_EURec0608.pdf](http://www.euforumrj.org/readingroom/Terrorism/Desvict_EURec0608.pdf).

<sup>156</sup> Inter-Am. C.H.R., *Report on the Situation of Human Rights in Bolivia*, ¶ 204, OEA/Ser.L./V/II, Doc. 8 rev. 1 (1997).

<sup>157</sup> *Id.*

the dignity and well-being of the victims that, unlike personal suffering, cannot be compensated financially even in nominal terms.”<sup>158</sup>

Often in the past, the idea of constructing a monument originated with the victims,<sup>159</sup> was subsequently supported by the Inter-American Commission on Human Rights,<sup>160</sup> and eventually was ratified by the Inter-American Court as part of its review of “compliance agreements” concluded between the State and the injured parties. At times, the idea to order the state to construct a monument came from the Commission itself,<sup>161</sup> with the support of the victims. At times, it is states themselves that have volunteered the building of monuments as part of compliance agreements<sup>162</sup> which have been ratified by the Commission. Sometimes, the compliance measures are offered in exchange for an end to domestic and international actions engaging their responsibility. There is no consistent terminology used by the Inter-American Court to describe the sort of monuments that should be built, but expressions such as “monument of atonement”<sup>163</sup> or “memorial monument”<sup>164</sup> are common and point in the same direction.

The Inter-American Court has denied few requests for the construction of monuments as reparations, although it has sometimes acknowledged that lesser measures, such as naming and inaugurating a school with the name of the victim, would be enough.<sup>165</sup> Typically, commemoration has been a form of reparation reserved for relatively grave or systematic violations of human rights. A violation of the right to life is almost always involved, frequently alongside a violation of the rights to personal liberty, personal integrity and humane treatment.<sup>166</sup> Sometimes, the initiative has

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<sup>158</sup> Carrillo, *supra* note 73, at 525.

<sup>159</sup> See I/A Court H.R., TRUJILLO-OROZA case, Judgment of Feb. 27, 2002, Series C, No. 92.

<sup>160</sup> *Id.* ¶ 92(B).

<sup>161</sup> See I/A Court H.R., *Moiwana Village* case, Judgment of June 15, 2005, Series C, No. 124, ¶ 218; I/A Court H.R., *Myrna Mack Chang* case, Judgment of Nov. 25, 2003, Series C, No. 101, ¶ 260(e).

<sup>162</sup> Carmelo Espinoza v. Chile, Case 11.725, Inter-Am. C.H.R., Report No. 19/03, OEA/Ser.L./V.II.118, doc. 70 rev. 2, ¶ 588 (2003).

<sup>163</sup> Villatina Massacre v. Colombia, Case 11.141, Inter-Am. C.H.R., Report No. 105/05, OEA/Ser.L./V.II.124, doc. 5 (2005).

<sup>164</sup> I/A Court H.R., *Barrios Altos* case, Judgment of Nov. 30, 2001, Series C., No. 87, ¶ 44(f).

<sup>165</sup> See I/A Court H.R., TRUJILLO-OROZA case, Judgment of Feb. 27, 2002, Series C, No. 92, ¶ 122.

<sup>166</sup> See Carmelo Espinoza v. Chile, Case 11.725, Inter-Am. C.H.R., Report No. 19/03, OEA/Ser.L./V.II.118, doc. 70 rev. 2 (2003).

been to commemorate one relatively prominent individual involved in activities such as the defense of human rights, as was the case with Myrna Mack Chang,<sup>167</sup> or to memorialize an emblematic figure of opposition to an oppressive government, such as Carmelo Soria Espinoza.<sup>168</sup> On other occasions, however, the monument is supposed to commemorate a more collective form of victimization, as does the memorial for the massacre of children in Colombia, in which the state erected a monument with a plaque in a park in the city of Medellin to “commemorate the victims, make moral amends and express atonement to the families.”<sup>169</sup>

Several goals are presented as being pursued by the construction of memorials. Even though a connection with victims is almost always made, at times the Inter-American Court comes close to treating monuments as essentially commemorative devices in service of transitional justice. For example, Judge Cançado Trindade has insisted on how a particular monument “defies the passing of time, or intends to do so” and stands “as a lesson that everyone must persevere in the search of their own redemption.”<sup>170</sup> One goal is simply the sort of backward-looking process of healing and reparation directed at the victims and their relatives. For example, the agreement in the case of *Villatina Massacre v. Colombia* “established that . . . [t]he National Government and the petitioners wish to reiterate, in this friendly settlement agreement, that the purpose of building a work of art is to commemorate the children, as well as make moral amends and provide reparations to the families of the victims.”<sup>171</sup> On other occasions, there is mention of “keeping the victim’s memory alive”<sup>172</sup> and “maintain[ing] remembrance of the victim.”<sup>173</sup> In the *Miguel Castro-Castro Prison* case, the Court spoke

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<sup>167</sup> See I/A Court H.R., *Myrna Mack Chang* case, Judgment of Nov. 25, 2003, Series C, No. 101.

<sup>168</sup> See Carmelo Espinoza v. Chile, Case 11.725, Inter-Am. C.H.R., Report No. 19/03, OEA/Ser.L./V.II.118, doc. 70 rev. 2 (2003).

<sup>169</sup> *Villatina Massacre v. Colombia*, Case 11.141, Inter-Am. C.H.R., Report No. 105/05, OEA/Ser.L./V.II.124, doc. 5, ¶ 25 (2005).

<sup>170</sup> I/A Court H.R., Concurring opinion of Judge A.A. Cançado Trindade, *Miguel Castro-Castro Prison* case, Judgment of Nov. 25, 2006, Series C., No. 160, ¶ 20.

<sup>171</sup> *Villatina Massacre v. Colombia*, Case 11.141, Inter-Am. C.H.R., Report No. 105/05, OEA/Ser.L./V.II.124, doc. 5, ¶ 25 (2005).

<sup>172</sup> I/A Court H.R., *TRUJILLO-OROZA* case, Judgment of Feb. 27, 2002, Series C, No. 92, ¶ 122.

<sup>173</sup> I/A Court H.R., *Myrna Mack Chang* case, Judgment of Nov. 25, 2003, Series C, No. 101, ¶ 286.

of an “acknowledgment of the suffering of the victims and . . . an expression of solidarity to them.”<sup>174</sup>

However, there is also clearly a more forward-looking and societal dimension to reparations involving memorials. In the *Moiwana Village* case, for example, Suriname agreed to “establish a memorial” referring to the events of Moiwana to serve as “a reminder to the whole nation of what happened and what may not [be] repeat[ed] in the future.”<sup>175</sup> The Court itself emphasized that the dual purpose of the monument should be “to memorialize the events of November 29, 1986, as well as to prevent the recurrence of such dreadful actions in the future.”<sup>176</sup> In other cases, there is mention of “raising public awareness about the need to avoid the repetition of harmful acts.”<sup>177</sup>

The link between the personal form of reparations and the more general exemplary value of reparations for society at large is exemplified by the request, by the mother of one killed by state agents, that the Government of Bolivia construct a monument in memory of her son because “this would allow future generations to learn about this part of Bolivia’s history and because the next of kin of detained-disappeared persons have the right to perpetuate in some way the memory of the youth who died because they disagreed with the political system.”<sup>178</sup> This case is an interesting example of reparation ordered on behalf of one person (here the victim’s relative), but where that person seeks to leave a deeper social trace and, as it were, donate some of her reparation to society at large and to posterity. As can be seen from such examples, there may in some cases be very little difference between reparations as an individualized concept and efforts at transitional justice more generally.

Also of interest, and apart from the principle of monument construction, are the specifics relating to how, when and where these monuments should be constructed. Obviously, as symbolic reparations, monuments represent considerable stakes for all those involved, starting with their more immediate beneficiaries. The Inter-American Court could

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<sup>174</sup> I/A Court H.R., Concurring opinion of Judge A.A. Cançado Trindade, *Miguel Castro-Castro Prison* case, Judgment of Nov. 25, 2006, Series C., No. 160, ¶ 19.

<sup>175</sup> I/A Court H.R., *Moiwana Village* case, Judgment of June 15, 2005, Series C, No. 124, ¶ 218.

<sup>176</sup> *Id.*

<sup>177</sup> See I/A Court H.R., *Trujillo-Oroza* case, Judgment of Feb. 27, 2002, Series C, No. 92, ¶ 122; I/A Court H.R., *Myrna Mack Chang* case, Judgment of Nov. 25, 2003, Series C, No. 101, ¶ 286.

<sup>178</sup> I/A Court H.R., *Trujillo-Oroza* case, Judgment of Feb. 27, 2002, Series C, No. 92, ¶ 46.



not simply order the state to build a monument without providing particular details as to its construction at the risk of a monument being built that was unsuited to its purpose. There is a demand from the relatives of victims to not let the process of memorialization be appropriated by the state, but instead be something over which the relatives retain a substantial amount of control. This is something to which Inter-American system institutions have been sensitive.

In practice, the Inter-American Court has gone quite a long way in determining modalities of construction, often ratifying and supervising complex agreements between parties. Some of these agreements are procedural, meaning that they relate to the conditions in which the monument should be built. Other agreements are substantive, meaning that they relate to the final product, including the size, shape and content of the monument. Echoing the more general line of reasoning identified above, that monuments are not simply about outcome, but also about process, a distinct effort has been made to “proceduralize” construction. Of particular importance is the need for consultation of relevant parties. In several cases, the Court has ordered that the design be made “in consultation with and taking fully into account the wishes of the survivors and family members of those killed,”<sup>179</sup> that “all aspects related to it should be agreed with the victim’s mother and brothers,”<sup>180</sup> that “design and location shall be decided upon in consultation with the victims’ representatives”<sup>181</sup> and that the location of a monument “be agreed among the parties.”<sup>182</sup>

The Court is also willing to be quite detailed about the final nature of the monument. This applies, firstly, to location. The State should not be

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<sup>179</sup> I/A Court H.R., *Moiwana Village* case, Judgment of June 15, 2005, Series C, No. 124, ¶ 197(d).

<sup>180</sup> I/A Court H.R., *TRUJILLO-OROZA* case, Judgment of Feb. 27, 2002, Series C, No. 92, ¶ 91(d).

<sup>181</sup> I/A Court H.R., *Moiwana Village* case, Judgment of June 15, 2005, Series C, No. 124, ¶ 218.

<sup>182</sup> I/A Court H.R., *Barrios Altos* case, Judgment of Nov. 30, 2001, Series C., No. 87, ¶ 44(f). A good example of the level of detail that the Inter-American Court is willing to get into is provided by the *Villatina Massacre* case, where the Court approved the terms of the friendly settlement agreement between the Colombian State and the petitioners to the IACHR, specifying, inter alia, that :

- (2) The petitioners and the Office of the Mayor of Medellín shall each submit two names of artists to invite them to present proposals, in accordance with the terms of reference that the Administrative Department of the Office of the President will be providing in due time.

allowed, obviously, to locate the monument in a place where its value both to victims and society would be less than it should be. The Court thus regularly speaks of a “suitable public location”<sup>183</sup> or “a suitable public place.”<sup>184</sup> Sometimes, the emphasis is on the relationship of the memorial to the person or persons it is supposed to commemorate.<sup>185</sup> Other times, the emphasis is on the visibility of the monument for society more generally.<sup>186</sup> At times, the location is not simply described in general terms, but as a choice between specific locations, such as in the *Villatina Massacre* case, where the Court-sanctioned agreement anticipated that the monument would be built in one of three parks in the city of Medellin.<sup>187</sup>

Another common feature in the Court’s case law is the specification of time frame for the construction. Again, the concern is that, left to their own devices, states might unduly prolong the process. Typically, dates are set for completion. In the *Moiwana Village* case, for example, the Court indicated that the monument “shall be completed within one year from the date of notification of the instant judgment.”<sup>188</sup> In the *Barrios Altos* case, the monument was to be “in place within 60 days of the signing of the agreement.”<sup>189</sup> Intermediary deadlines may also be set, such as the time that a municipal office has to obtain necessary building permits.<sup>190</sup>

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- (3) The parties agreed that the petitioners would have the right to suggest some parameters in the terms of reference for hiring the artist.

*Villatina Massacre v. Colombia*, Case 11.141, Inter-Am. C.H.R., Report No. 105/05, OEA/Ser.L./V/II.124, doc. 5, ¶ 25 (2005).

<sup>183</sup> I/A Court H.R., *Moiwana Village* case, Judgment of June 15, 2005, Series C, No. 124, ¶ 218.

<sup>184</sup> *Id.* ¶ 199(j).

<sup>185</sup> “. . . in the region of Guatemala where she worked intensely.” I/A Court H.R., *Myrna Mack Chang* case, Judgment of Nov. 25, 2003, Series C, No. 101, ¶ 270(d)(iii). “. . . at the place where she died or nearby, with a reference to the activities she carried out.” *Id.* ¶ 286.

<sup>186</sup> “. . . in an important location, where there is a substantial flow of traffic, in the center of Santa Cruz.” I/A Court H.R., *TRUJILLO-OROZA* case, Judgment of Feb. 27, 2002, Series C, No. 92, ¶ 91(d).

<sup>187</sup> *Villatina Massacre v. Colombia*, Case 11.141, Inter-Am. C.H.R., Report No. 105/05, OEA/Ser.L./V/II.124, doc. 5, ¶ 25 (2005).

<sup>188</sup> I/A Court H.R., *Moiwana Village* case, Judgment of June 15, 2005, Series C, No. 124, ¶ 218.

<sup>189</sup> I/A Court H.R., *Barrios Altos* case, Judgment of Nov. 30, 2001, Series C., No. 87, ¶ 44(f).

<sup>190</sup> See *Villatina Massacre v. Colombia*, Case 11.141, Inter-Am. C.H.R., Report No. 105/05, OEA/Ser.L./V/II.124, doc. 5, ¶ 25 (2005) (“The Office of the Mayor of

The Court also often specifies who shall take care of the process of construction and identifying specific actors, as well as how such individuals are to be designated. The settlement in the *Villatina Massacre* petition is an example of a complex, multi-party arrangement involving the petitioners, leading public authorities and the IACHR.<sup>191</sup> The intention is obviously that the highest political levels of the state, such as the President of the Republic in *Villatina Massacre*, be involved in direct consultation with the petitioners, and under some form of international supervision. Other indications as to participants have a more “qualitative” nature, such the requirement in *Villatina Massacre* that the artist commissioned to do the work was to “have some personal or professional experience in the field of human rights or in similar or related areas.”<sup>192</sup>

Finally, the actual shape, design and form of the monument are often indicated, in at least some general way, to take into account the desire of the petitioners. For example, in *Villatina Massacre*, the Court confirmed that the following requests of the petitioners should be taken into account: “a) that the work of art be made of bronze, b) that the work of art be comprised of 9 elements which should be clearly identifiable as the 9 victims, c) that the project include the complete remodeling of the public space that will be used . . . .”<sup>193</sup> Particularly important are various plaques explaining the significance of the monument, which on its own might give relatively few clues. The short descriptions contained on the plaques are of intense importance from both a reparations and transitional justice point of view. On some occasions, judgments indicate what should not appear on the plaque.<sup>194</sup> However, most often, judgments dictate what must be included,

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Medellín, in turn, has five days as of the date of the signing of the inter-administrative agreement to obtain the necessary permits issued by Municipal Planning.”).

<sup>191</sup> *Id.* ¶ 25(4) (“The contracting process will be conducted directly by the Administrative Department of the Office of the President, which will also supervise implementation of the contract, without detriment to the collaboration of the Ministry of Foreign Affairs and the petitioners in the latter activity. In this hiring process, on the basis of what was agreed, a proposal evaluation committee will be set up with the participation of a person designated by the Ministry of Foreign Affairs, one by the petitioners in coordination with IACHR, and one by the Office of the President of the Republic.”).

<sup>192</sup> *Id.* ¶ 25(3).

<sup>193</sup> *Id.* ¶ 25.

<sup>194</sup> *Id.* (“The plaque will not bear the name of any national, departmental, or municipal authority.”).

which is typically the names of all victims and their age when they died.<sup>195</sup> Court-ratified plaques go quite far in linking the monument explicitly to state liability and reparation.<sup>196</sup>

Also of interest is the fact that, on occasion, the Court has indicated the conditions in which the monument should be unveiled, including the nature of the relevant ceremony. For example, the monument following the Villatina Massacre was to be “installed during a public ceremony attended by representatives of the National Government and local government, the families of the victims, and the petitioners.”<sup>197</sup> Such is the willingness of the Court to have the upper hand on the construction process that it has sometimes intervened to require modifications of existing monuments to honor victims. For example, in the *Miguel Castro-Castro Prison* case, after Peru complained that there already was a commemorative monument,<sup>198</sup> the Court insisted that, although the existing monument constituted “an important public acknowledgment to the victims of violence in Peru,” the State was to ensure that, within a year, “all the people declared as deceased victims in the present Judgment be represented in said monument.”<sup>199</sup>

#### B. Monuments as Victim Assistance

In a sense, if commemorative monuments can be ordered as reparation, then *a fortiori* their construction can be encouraged as a form of assistance to victims. Indeed, the building of such monuments has at times been described as a typical “non-judicial mechanism.”<sup>200</sup> Truth and reconciliation

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<sup>195</sup> This was the case in the Villatina Massacre, where the youngest victim was 8 years old. *Id.*

<sup>196</sup> See *id.* The Villatina Massacre plaque is to include the following mention:

The Colombian Government recognized its responsibility to the Inter-American Commission on Human Rights of the OAS and to Colombian society for the violation of human rights in this serious crime, chargeable to State agents.

This monument is a way to commemorate the victims, make moral amends and express atonement to the families, and although it is not enough to ease the pain produced by this action, it has become a fundamental step for justice to be done and to remind Colombians that crimes of this nature cannot be repeated.  
*Id.*

<sup>197</sup> *Id.* ¶ 21.

<sup>198</sup> I/A Court H.R., *Miguel Castro-Castro Prison* case, Judgment of Nov. 25, 2006, Series C., No. 160, ¶ 142.

<sup>199</sup> *Id.* ¶ 454.

<sup>200</sup> See ICRC Report, *supra* note 116, at 9.

commissions are perhaps most emblematic of a soft practice of encouraging the construction of commemorative monuments as an integral part of victim assistance that is not particularly tied to reparation. Truth and reconciliation commissions are interesting in relation to the international criminal tribunals in that they are supposed to have a birds-eye view of proceedings, consequently encompass a more general take on the exigencies of transition and, therefore, be less prone to some of the simplifications of criminal justice. As a result, such commissions have arguably been at the forefront of proposing the creation of commemorative monuments as part of reparations.

The Salvadoran,<sup>201</sup> Honduran,<sup>202</sup> Guatemalan,<sup>203</sup> and Chilean Commissions<sup>204</sup> all recommended the building of some form of monument incorporating the names of all victims in the conflict, to honor those who died and preserve the memory of the victims. The South African Truth and Reconciliation Commission considered that public memorials, such as museums and monuments, were “[s]ymbolic reparation” for damage done to the entire South African society.<sup>205</sup> Although not all of these recommendations for monuments were implemented,<sup>206</sup> it is revealing that they were considered to be part of the “package” of transitional justice.

The report of the Truth and Reconciliation Commission Sierra Leone indicated “great interest in the creation of memorials,”<sup>207</sup> and that the commission would “encourage” and “where necessary, participate in discussions within the communities on the erection of monuments and memo-

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<sup>201</sup> See United Nations, *COMM’N ON THE TRUTH FOR EL SAL., From Madness to Hope: the 12-Year War in El Salvador*, § IV(B)(1), (1993), available at [http://www.lemoyne.edu/Portals/11/pdf\\_content/ElSalvador-Report.pdf](http://www.lemoyne.edu/Portals/11/pdf_content/ElSalvador-Report.pdf) (last visited Apr. 12, 2010).

<sup>202</sup> See Mike Kaye, *The Role of Truth Commissions in the Search for Justice, Reconciliation and Democratisation: the Salvadorean and Honduran Cases*, 29 J. LAT. AMER. STUD. 693, 706-07 (1997).

<sup>203</sup> See Guat. Comm’n for Hist. Clarification, *Guatemala: Memory of Silence*, Recommendations § II(4)(c), available at <http://shr.aaas.org/guatemala/ceh/report/english/recs2.html> (last visited Apr. 12, 2010).

<sup>204</sup> See Mark Ensalcado, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16 HUM. RTS. Q. 656, 663 (1994).

<sup>205</sup> See Truth and Reconciliation Comm’n of S. Afr., Report 95 (2003).

<sup>206</sup> See Alexander Segovia, *The Reparation Proposals of the Truth Commission in El Salvador and Haiti: a History of Noncompliance*, in THE HANDBOOK OF REPARATIONS 154, 156-60 (Pablo de Grief ed., 2006).

<sup>207</sup> Appendix 4, *supra* note 101, para. 20.

rials for the victims of the conflict . . . .”<sup>208</sup> Indeed, it is perhaps the commission that has given most attention to the issue. Appendix 4 of the report insists on the “significance of remembering the past” and describes memorials as “unique and versatile mechanism(s) for remembrance” which, in the context of transitional justice, “serve as prisms through which to see past, present and future.”<sup>209</sup> The Commission made presentations on that matter to various international and domestic constituencies and found that “there is great interest in the creation of memorials in Sierra Leone both on an individual and on an organized and national level . . . .”<sup>210</sup> Although sometimes falling short of the actual building of new monuments, Sierra Leone Truth and Reconciliation Commission efforts have led to the renaming of several sites. Notably, Freetown’s Congo Cross Bridge has been renamed the “Peace Bridge.”<sup>211</sup> A National War Memorial Committee was also established in 2002.<sup>212</sup>

Outside institutionalized commissions, it is notable that several projects of “sites of conscience” originating from victims themselves have been supported through international funding. For example, the International Coalition of Sites of Conscience has created a Project Support Fund that provides both financial and technical support to the building of such sites.<sup>213</sup> As such, it has been active in Sierra Leone, for example, where it has supported the activities of the Campaign for Good Governance (CGG), a local NGO involved in transitional issues and intent on following up on the Truth and Reconciliation Commission’s recommendations on symbolic reparations.<sup>214</sup> The role of the CGG has typically been to bring various civil society actors together to discuss transitional strategies, notably in the town

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<sup>208</sup> SIERRA LEONE TRUTH AND RECONCILIATION COMM’N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION, VOLUME ONE (2004) 239, *available at* <http://www.sierra-leone.org/TRCDocuments.html> (follow “Volume 1” hyperlink) (last visited Apr. 12, 2010).

<sup>209</sup> Appendix 4, *supra* note 142, para. 3.

<sup>210</sup> *Id.* para. 20.

<sup>211</sup> SIERRA LEONE TRUTH AND RECONCILIATION COMM’N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION, VOLUME THREE B (2004) 476, *available at* <http://www.sierra-leone.org/TRCDocuments.html> (follow “Volume 3B” hyperlink) (last visited Apr. 12, 2010).

<sup>212</sup> Appendix 4, *supra* note 101, para. 19.

<sup>213</sup> *See* Int’l Coalition of Sites of Conscience, New Sites of Conscience Programs, <http://www.sitesofconscience.org/activities/new-programs/en/> (last visited Apr. 12, 2010).

<sup>214</sup> *See id.*

of Gbendembu, the site of a mass grave.<sup>215</sup> A similar initiative has been launched in Liberia and operates parallel to the official Truth and Reconciliation Commission.<sup>216</sup> There is, therefore, a clear practice of sponsoring sites of conscience even outside judicial processes, but with a particular view to ensuring victim participation and providing a more general form of rehabilitation.

## V. THE ARGUMENT FOR MONUMENTS IN THE ICC/TFV CONTEXTS

In the previous section, I have sought to show how monument building has had a significant role in victim-oriented initiatives, even as it draws on the register of transitional justice. The contexts in which monument building takes place are, of course, different than those in which international criminal tribunals operate. It is critical to ask whether the experiences of monument building can be transferred to the ICC context and, if so, whether they should be. In this section, I seek to make the argument not only that encouraging the building of commemorative sites is a significant contribution that the Rome institutions can make, but also that it could uniquely alleviate some of the concerns that I have identified as emerging from the current reparation/assistance regime.

### A. *The Quantitative Problem*

Given what will probably be fairly limited resources, both in the absolute and relative to some of the harm suffered, monuments seem to make good use of scarce reparatory and assistance resources. Monuments need not be expensive at all, and their reparatory and rehabilitative potential is strong if they reestablish some of the victims' dignity, facilitate transitional justice, allow commemoration, help build a historical record and prevent future atrocities.

The construction of monuments as reparation or assistance measures limits the risk that some victims' plight will be more highlighted than others. Even if a monument is constructed as a result of a particular reparation order issued following a particular guilty verdict, its impact will likely, or can be made to, have an impact beyond the particular victims of the accused. Monuments create a positive externality for as many victims and their kin as they commemorate successfully. Moreover, to the extent that commemorative monuments are built at the TFV's autonomous initiative as a form of assistance, monuments can even more clearly be a way to bridge

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<sup>215</sup> See *id.*

<sup>216</sup> See *id.*

the gap between participating and non-participating victims in court, by ensuring that all benefit from the process and result.

The building of commemorative monuments essentially creates a positive externality from which all victims can benefit. This may include victims of individuals who were prosecuted but who, for some reason, did not, or could not, participate in proceedings, or could not prove their quality as victims. It may include victims of individuals who were not prosecuted either because they could not be found, or because domestic courts proved “able and willing” to judge them. Victims of crimes analogous to the ones for which a conviction was obtained will nonetheless benefit from the commemoration of analogous massacres, which will have been shown to be part of a pattern. In the end, reparation and assistance to some may end up representing reparation and assistance to all.

Finally, the building of commemorative monuments is a device that is sufficiently ambitious to do justice to some of the harm suffered, but not so broad as to create misplaced expectations that the international community can fully compensate all of the suffering caused. Monuments afford a definite visibility for the efforts of the ICC and TFV, where sprinkling of very small amounts of reparations to many claimants might engender frustration. By associating international criminal justice more closely with transitional justice efforts, by “symbolizing” harm rather than seeking to account for it numerically, “monuments” provide a clear sense of the sort of aid that the ICC can realistically provide, assistance which is characterized by how it can help victims rebuild their lives concretely. Such efforts provide a result that is tangible and can maximize transparency.

### *B. The Qualitative Problem*

ICC and TFV contributions to the construction of memorializing monuments would clearly help nudge reparations and assistance beyond the monetary or material and the strictly rehabilitative, towards something broader, in the order of “satisfaction,” as understood by international human rights bodies. Monuments “make sense” of suffering not by reducing it to its economic loss and welfare rehabilitative dimensions. Instead, they harness reparations and assistance to the more complex goal of healing societies through the solemn recognition of suffering. They give a meaning to the suffering of victims and transform it into a positive contribution to society rather than simply try to compensate for it. The process also ensures that victims are treated with dignity. Victims are treated as citizens concerned with their society and the avoidance of a repeat of the crimes from which they suffered, rather than individual interest maximizers seeking only to improve their personal situation.



As has been seen, it is only partly problematic that the ICC legal regime does not incorporate satisfaction as a possible form of reparation. At least when it comes to the TFV's "assistance" activities, there is no real limitation to the sort of project that money can be provided for, as long as it is for the benefit of victims. The issue is more complicated if one is talking of reparations *stricto sensu*, but I have argued that the ICC regime does not so much exclude as fail to mention symbolic reparations, and the Court seems open to interpret its mandate broadly.<sup>217</sup> At any rate, monuments are a singular sort of symbolic reparation; they have symbolic effects but clearly have a substantial material and financial component to them, so that they could easily be simply one of the ways in which reparation money is spent. In that sense, the TFV, as "implementer" of the Court's reparation orders, will also act essentially as a "demonetizing" device, one that will transform, for example, reparation paid by the convicted into services and assistance. "Rehabilitation" as a form of reparation, moreover, is quite a broad term and could be understood to incorporate reparation that is largely symbolic in nature, rather than simply the more traditional rehabilitative focus on health.<sup>218</sup>

Further, commemorative monuments are particularly suited to encouraging participation. Contra some NGOs' suggestion that "[e]ngaging in community reconciliation activities can in many ways destroy the individual agency of victims to determine how they wish to respond to their victimisation . . . ,"<sup>219</sup> the record of actually building commemorative sites, as described earlier in this article,<sup>220</sup> suggests that such sites are formidable vehicles of participation so long as they are conceived properly. The ICC and TFV could ensure that monuments are conceived in ways that maximize their potential as collective processes of reckoning. As has been seen, this is something that the IACHR has encouraged, and there is no reason to think that, at least under the TFV's mandate, something similar could not be done with the Court. The TFV has a monitoring role on how reparations or assistance funds are spent, and that monitoring role might extend to outlining or at least influencing the broad conditions under which the design of

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<sup>217</sup> See Draft ICC Strategy, *supra* note 62.

<sup>218</sup> See WEMMERS REPORT, *supra* note 1, at 35 (noting that "[e]ven though satisfaction is not part of the formal definition of reparation adopted by the Assembly of State Parties, many of its elements, such as an apology, public acknowledgement and commemorations, can have a rehabilitative effect on victims."). See also, ICC Rules, *supra* note 2, Rule 94(1)(f) (Victim's requests for reparations shall include "[c]laims for rehabilitation and other forms of remedy . . . .").

<sup>219</sup> Comments on Global Strategic Plan, *supra* note 8, at 3.

<sup>220</sup> See *infra* § III.

commemorative sites is to be decided. Intelligently-designed reparations, such as those crafted by the IACHR, can indicate the broad direction to be taken whilst leaving the details to be worked out by the state, the victims and possibly even some of the perpetrators themselves.<sup>221</sup>

### C. *The Scope Problem*

Monuments also seem an ideal way of collectivizing reparations in a way that transcends some of the *ratione personae* limitations associated with them. In the context of the Rome institutions, it is quite clear that any monument ordered as a form of reparation or built with TFV funds would have a beneficial impact, not only on the particular victims of the accused, but on all victims. Indeed, the monument might not even particularly distinguish between classes of victims. Such a monument can be a way of suggesting that the ICC regime is less about attending to the plight of a multitude of isolated individuals than it is about engaging in a broader rehabilitative effort towards society, the body politic and communities. To the extent the ICC legal framework specifically anticipates the possibility of collective reparations and/or collective TFV assistance, its broad focus militates in favor of the construction of monuments a typical form of aid. “Monuments” can strongly signal the extent to which the crimes were committed both against individuals and a collectivity, such as an ethnic group, a civilian population, or a side in a conflict. One can see how monuments might become the object of processes of collective appropriation, as they end up being understood and interpreted in complex ways by society.

Monuments can also create temporal “bridges” between the past and the future in ways that deal effectively with some of the temporal binds of both reparation and assistance. Their very architecture can be thought of as a way both to emphasize the harm suffered in the past and be an aspiration to the future, even as they serve as focal points for reconciliation and truth telling in the present. In other words, commemorative sites combine the best aspects of backward-looking reparations and future-oriented “assistance.” In that respect, monuments also seem particularly suited to creating a long-term legacy of international criminal justice. They are clearly here to stay, and the experience of “sites of conscience” is that many have had a very significant duration. In the long term, monuments can serve as symbolic reminders of the past, and as symbols of a certain continuity. Beyond that, they can stand as bulwarks against the risk of repetition.

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<sup>221</sup> See Appendix 4, *supra* note 101, para. 24. As has been pointed out in the Sierra Leone context, especially given the level of illiteracy, “public work around which to gather and discuss would serve as an excellent vehicle of sensitization.” *Id.*

*D. The Contextual Problem*

The building of monuments can be seen as a way of de-individualizing, or collectivizing, not only the victims' suffering, but also the guilt of the perpetrator or perpetrators. Monuments have the potential for partly smoothing out international criminal justice's bias in favor of the guilty individual. The examples that I have highlighted of monument construction being ordered primarily dealt with crimes committed by the state and significant numbers of its agents. It is because of the structural and organizational nature of the crimes at stake that it made sense to order reparations, such as monuments, which highlighted the collectively-committed nature of the crimes. Indeed, it would almost not make sense to have monuments evoking the victims of a single individual. In many cases, even if such an individual were the head of state, the crimes would have been committed by a multitude. If monuments are erected as part of ICC- or TFV- related efforts, their design will inevitably reflect the wrongdoing of a collectivity of participants in atrocities. Therefore, even in cases where individual crimes trigger specific reparation orders, monuments should be conceived, and come to be seen, as broader reparation for a variety of crimes. They can also better transcend the divisions between guilt and different types of responsibility and causes, so that a monument ordered or built with the encouragement of the ICC or TFV could be evidence, not only of individual evil, but also of state failure or the international community's omissions.<sup>222</sup>

Moreover, a victims' reparations or assistance policy that focuses on how it can contribute to transitional justice is one that will distinguish itself from parallel transitional, reconstruction and development policies. At a certain level, monuments can be part of the process of transcending the divide between judicially-determined reparations and international assistance in a way that could be highly specific and recognizable. "Monuments" can help fuse the registers of international criminal justice and transitional justice with that of victim rehabilitation. Indeed, the TFV has suggested that one of the key "cross-cutting issues" in its program overview is "promoting community reconciliation, acceptance; and rebuilding community safety nets."<sup>223</sup> At the very least, victims must be victims of crimes falling within the Court's jurisdiction, which are, in all likelihood, crimes over which the Prosecutor has launched an investigation. Commemorative

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<sup>222</sup> For example, the international community's own role in allowing certain crimes to happen might be recognized through monuments, even as it tends to be eclipsed by international criminal trials.

<sup>223</sup> Int'l Criminal Court [ICC], *Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the Period 1 July 2007 to 30 June 2008*, ¶ 12, ICC-ASP/7/13 (Sept. 3 2008).

initiatives, in this context, are sufficiently tied to the work of the ICC that even the TFV's autonomous policies will be seen as more generally flowing from Rome Statute state parties' overall commitment to accountability for international crimes. As such, TFV commemorative initiatives encouraged by the TFV will be in a better position to distinguish themselves from the general work of reconstruction and development that invariably goes on in transitional contexts.

#### CONCLUSION

The Statute, Rules and various other sources do not particularly anticipate symbolic reparations, satisfaction, or, indeed, anything as specific as the Court ensuring that reparations are used for the construction of commemorative monuments. However, this article has argued that it does seem as if such reparations could be read into the Statute and, more importantly, that encouraging "sites of conscience" through the TFV's implementation efforts is just the sort of focused, well thought-out victims reparations policy that could maximize the ICC's impact. When it comes to the autonomous assistance powers of the TFV, the TFV regulations are formulated broadly and, even though they do not per se particularly evidence a shift towards the symbolic and transitional, there are already some signs that this may change. Indeed, the TFV, rather than the Court, and the TFV as an autonomous source of reparations and assistance, rather than the TFV as mere implementer of the Court's reparations awards, should be the centerpiece of such a policy. I foresee that this is a division of labor that the Court may be quite happy to live with, especially given the constraints on its time and the relative superiority of an "administrative" program over one of judicially-determined reparations.<sup>224</sup>

At any rate, whether funds are channeled towards commemorative initiatives either as reparations ordered by the Court but filtered by the TFV, or as assistance given directly by the TFV, will in all likelihood make very little difference to victims. One might argue, in fact, that the encouragement of commemorative sites is really where the distinction between

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<sup>224</sup> Indeed, the TFV has already made some steps in this direction by providing funds for projects with a healing and reconciliation component. See TFV, TFV/DRC/2007/R1/019, <http://www.trustfundforvictims.org/projects/tfvdrc2007r1019> (last visited Apr. 26, 2010); TFV, TFV/UG/2007/R2/039 & TFV/UG/2007/R2/041, <http://www.trustfundforvictims.org/projects/tfvug2007r2039-tfvug2007r2041> (last visited Apr. 26, 2010). These did not involve any strong commemorative element and are part of early processes of assistance, but once verdicts have been pronounced, some of the TFV's reconciliation work may take a much more "reparative" connotation, and engage fully with issues of long-term transition.

reparations and assistance becomes moot, especially in a context where the challenge is less to devise whether one has a strong entitlement to either than it is to make the most of very limited funds. We may, in fact, already be moving away from a pure reparatory framework to one where victims of crimes within the jurisdiction of the Court will primarily hear about the Fund (largely because the Fund will provide much quicker relief, due to it being much better funded), and one which will enable victims to avoid the stress of participation at the trial.

Becoming involved in memorialization is one of the ways in which the ICC could “reach for the impossible” by “simultaneously satisfy[ing] individual and socio-political needs.”<sup>225</sup> It could also go a long way to bridge the gap between the “retributory theatre”<sup>226</sup> and the very real and grim world that victims of atrocities have to live with. Compared to monetary awards or general rehabilitation efforts, which are relatively blunt instruments of transitional justice, monuments can offer much more nuanced, detailed and complex narratives of what happened, as well as why and how. Memorials “lie at the intersection of the historical, political and aesthetic axes.”<sup>227</sup> In many ways, the architecture and art of commemoration are richer languages to convey the totality of a traumatic experience than any other tool.<sup>228</sup> For the purposes of transitional justice, it is arguably these more totalizing narratives, even if they remain imperfect and contentious, that are most necessary. Monuments also offer the potential for “translating” a judgment into something broader and more immediately and culturally cognizable by victims and society. Properly conceived, they can be richer with symbolic and, therefore, transition-relevant material than many judgments. This is increasingly relevant as the TFV seems bent on being a “participatory” body that encourages civil society to come up with projects to help victims.

There is a broader lesson in all of this, one that has to do with how some key concepts of international criminal justice are understood. I argue for a much stronger intertwining of the themes of international criminal justice and transitional justice, reparations, assistance and memorialization.

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<sup>225</sup> HAMBER, *supra* note 93, at 582.

<sup>226</sup> See generally E.M. Morgan, *Retributory Theater*, 3 AM. U. INT’L. L. REV. 1 (1988).

<sup>227</sup> Appendix 4, *supra* note 101, para. 4.

<sup>228</sup> See I/A Court H.R., Concurring opinion of Judge A.A. Cançado Trindade, *Miguel Castro-Castro Prison* case, Judgment of Nov. 25, 2006, Series C., No. 160, ¶ 20 (writing that the “mystery of artistic creation” offers the “indescribable moment” in which “the worldly limitation of the perishable ends in us humans and the perennial starts.” (quoting Stefan Zweig)).

This calls for a different theory of these distinct themes and their relation to each other; international criminal justice must see itself not only as law and prosecution based, but also results oriented and dynamically geared towards affecting the transitional future. Reparations, furthermore, need to increasingly emphasize collective and symbolic dimensions that give a more holistic meaning to the suffering of victims. As Jean-Baptiste Jeangène Vilmer put it, “le régime de réparation de la CPI . . . reste encore trop dans une logique rétributiviste . . . il faudrait plutôt aborder (le problème) dans une logique conséquentialiste, qui évalue moralement l’action (de la Cour) en fonction de ses conséquences.”<sup>229</sup> Transitional justice can be the glue that links these different ideas together in complex and novel ways.

If the ICC/TFV regime were to pursue the sort of lead I indicate, it would move even further away from traditional judicial logic. In other words, it would be part of a broader trend where the “right to reparation,” instead of being “exercised as part of the outcome to some form of legal proceedings,” is increasingly “divorced” from such proceedings and “integrated into wider social, political, and judicial reform processes, which together are intended to contribute to what is commonly termed ‘social reconstruction’ or ‘reconciliation.’”<sup>230</sup> At the same time, it would retain a unique specificity compared to broad transitional programs, which deal with more than atrocities, in that it would remain tied specifically, if not to the establishment of individual guilt, at least to the commission of international crimes and the specific, if diffuse, entitlement that flows from having suffered from them. The ICC/TFV regime would thus emerge as a comprehensive, at least partly internationally-triggered and -monitored program to deal with the consequences of international crimes in transitional contexts. It would complement broader transitional efforts rather than act as a substitute to them.

Several criticisms can no doubt be made of the option that this article has suggested. A first critique is that “monuments as reparations” or “monuments as assistance” might end up allowing the international community to dictate to a country how it should go about its transition in a context where the ICC, in particular, may already be *perceived* as having arrogated

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<sup>229</sup> “. . . the ICC’s reparations regime . . . remains stuck in retributivist logic . . . it would be better to approach the problem from a consequentialist logic, which morally evaluates the action (of the Court) according to its consequences.” JEAN-BAPTISTE JEANGÈNE VILMER, RÉPARER L’IRRÉPARABLE: LES RÉPARATIONS AUX VICTIMES DEVANT LA COUR PÉNALE INTERNATIONALE 176 (2009).

<sup>230</sup> M. Briton Lykes & Marcie Mersky, *Reparations and Mental Health: Psychological Interventions Towards Healing, Human Agency, and Rethreading Social Realities*, in THE HANDBOOK OF REPARATIONS 589, 590 (Pablo de Greiff ed., 2006).

itself a broad power over transitional justice outcomes. This is indeed a danger, but not a significant one. The Court and TFV will be well inspired to draw from the experience of the IACHR, which has consistently elected to decide the principle of monument construction and sometimes has gone as far as giving a few broad orientations, but has resisted the temptation of taking on the role of the architect – something which would defeat the purpose of having monuments as modes of popular and collective memory appropriation. At any rate, there is a big difference between the IACHR and the ICC/TFV regime. While the former can order states to build monuments, the latter will only be able to fund initiatives, private but also maybe public, that have the same effect. The TFV, in this context, will be particularly suited to determine whether there is a real local demand for help in commemorating certain events, and should act as an enabler rather than as a provider.

A second, more complicated argument against this sort of symbolic contribution to victims challenges the reasons for going through the Rome Statute institutions in the first place. After all, it is not as if the international community, the state involved, or private interests could not finance such initiatives on entirely different budgets, decoupling the issue of memory entirely from the ICC and TFV. This may, of course, happen, and is not a bad thing in itself, except that there is a strong, principled point in favor of drawing a connection between the international community's principal tool of international criminal justice and memorialization. The idea is that the edification of commemorative sites is not alien to the process of international judicial accountability and attention to victim needs, but is, in fact, an inherent part of it. There may also be a concern that broader transitional justice initiatives should not "piggyback" on scarce funds devoted specifically to victims. It is true that monuments have a positive impact that transcends immediate victims of crimes. However, aside from the fact that victims have often been conceived of having been and, in fact, have been, the prime beneficiaries of the construction of "sites of conscience," the fact that such sites act as positive social externalities in addition to benefitting particular victims surely is not an argument against them. This is especially the case when one considers that reconstructing a society fully informed by the crimes of the past and thus ready to give victims their rightful place in collective memory is, in a sense, one of the greatest services one can render to victims.

A third and final argument relates to the intrinsic limitations of monuments as "*lieux de mémoire*" and transitional justice tools. It has been argued, for instance, that monuments are "not universally agreed to be effective representations of memory" any more than judgments or truth commission reports, and that monuments represent "specific (and therefore

limited and possibly fallacious) interpretations of the past.”<sup>231</sup> Monuments can also be criticized as simplifications and as glossing over the conflict-orientated character of transitions, or as being culturally unsuited,<sup>232</sup> not to mention too expensive.<sup>233</sup> Moreover, as Pierre Nora famously stated, it is because there are no longer “milieux de mémoire” that we need “lieux de mémoire;” i.e., it is because societies no longer routinely remember that their memory needs to be incarnated in stone.<sup>234</sup> There is a danger that, having detached themselves from memory, having externalized memory into “things,” populations will feel that they are no longer bound to engage in any memory work.<sup>235</sup>

These points are well taken but not conclusive. Monuments are obviously not a panacea and it is important not to claim too much in their name. Monuments are not, and should not, be presented as the whole story of an atrocious episode, and should be open to many interpretations before, during and after their construction.<sup>236</sup> They should, in other words, “avoid over-determining or imposing closure . . .”<sup>237</sup> However, as has been noted, monuments are most often not a denial of the conflictive nature of memory, but an opportunity for that conflict to express itself.<sup>238</sup> As to “lieux de

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<sup>231</sup> Mia Swart, *Name Change as Symbolic Reparation after Transition: the Examples of Germany and South Africa*, 9 German L. J. 105, 112 (2008).

<sup>232</sup> See Chris Cunneen, *Exploring the Relationship Between Reparations, the Gross Violations of Human Rights and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE 355 (Dennis Sullivan & Larry Tifft ed., 2006).

<sup>233</sup> The issue arose, for example, in Morocco, where a proposal was made for a \$600,000 statue in a poor community in the middle of the desert. See Sebastian Brett, et al., Int’l Conf. Memorialization and Democracy: State Policy and Civic Action, Santiago, Chile, June 20-22, *Memorialization and Democracy: State Policy and Civic Action*, 17, available at <http://www.ictj.org/images/content/9/8/981.pdf>.

<sup>234</sup> Pierre Nora, *Between Memory and History: Les Lieux de Mémoire*, 26 REPRESENTATIONS 7-24 (1989).

<sup>235</sup> On the danger that memory will be “wholly absorbed by its meticulous reconstruction” and that monuments manifest “the compulsion to remember and the compulsion to forget,” see SMELSER, *supra* note 106, at 53 (“[T]o memorialize is to force a memory on us by the conspicuous and continuous physical presence of a monument; at the same time a memorial also conveys the message that [now] that we have paid our respect to a trauma, we are [now] justified in forgetting about it.”).

<sup>236</sup> See JELIN, *supra* note 139, at 40.

<sup>237</sup> Hite, *supra* note 109, at 24.

<sup>238</sup> See JAMES E. YOUNG, *THE TEXTURE OF MEMORY: HOLOCAUST MEMORIALS AND MEANING* 21 (1993) (“It may also be true that the surest engagement with memory lies in its perpetual irresolution. In fact, the best memorial to the Fascist



memoires” substituting for “milieux de mémoire,” that is essentially a call for constructing “lieux de mémoire” that challenge us to remember, and that are works in progress rather than epilogues.<sup>239</sup> The important thing is not that “monumentalization” has limitations, but that it has a place, and will represent a sensible and, indeed, in some cases, superior, use of resources.

Ultimately, monuments, most notably shrines, memorials and museums,<sup>240</sup> are really a metaphor for something bigger that the ICC and the Fund should be more interested in. Rather than deciding the issue of reparations deductively on the basis of principles that make little sense until they are applied to real world situations, reparation and assistance policy should be shaped by the specific transitional needs of each society and attentiveness to how the international community can augment its beneficial impact. This is something that the TFV has already understood and why, either as an implementer of Court orders or in its own capacity, it constitutes the best hope of both transforming Court-ordered reparations into symbolic ones and launching into its own grassroots-oriented assistance. However, the TFV will have to guard against the temptation of spreading itself too thin and acting as too general a distributor of rehabilitation in a context where victims primarily need societal changes that protect them against further victimization.

None of this will occur without substantially more theorizing about what is going on in terms of the ICC when it comes to victims. This will, in due course, call for further truly interdisciplinary scholarship on reparations. In particular, I have in mind the unexplored connections between international criminal law, transitional justice, geography, cultural studies and the “architecture of commemoration.” At a certain level, the confluence of responsibility, memory and art may lead to some of the most enduring realizations of international criminal justice.

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era and its victims may not be a single memorial at all – but simply the never-to-be-resolved debate over which kind of memory to preserve, how to do it, in whose name, and to what end.”).

<sup>239</sup> See JELIN, *supra* note 94, at 151 (discussing the need to “search for ways in which to incorporate in the design of territorial markers a level of ambiguity that invites active engagement of the public, offering an opportunity for expression of a variety of sensibilities and for an active labor of memory . . .”).

<sup>240</sup> Although I have highlighted the monumental in this article as particularly emblematic of what I have in mind, “lieux de mémoire,” strictly, can include anniversaries, naming of streets, ceremonies, conservation of archives, etc.